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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 28, 2020

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COURT OF APPEALS

CASES REPORTED

FILED 18 JUNE 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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ACKNOWLEDGMENTS

Separation agreement—presumption of regularity—rebuttal required—In a dispute over the validity of a couple's separation agreement, where the husband did not deny he signed the agreement in the presence of a notary and presented no evidence to rebut the presumption of regularity of the notarization, and where the wife's evidence, along with the agreement itself, supported that presumption, the trial court erred by determining the agreement was not properly acknowledged and therefore void. **Sfreddo v. Hicks, 84.**

ADMINISTRATIVE LAW

Attorney fees—appellate—authorized by plain language of statute—Pursuant to the plain language of N.C.G.S. § 126-34.02(e), the Office of Administrative Hearings (OAH) had authority to award appellate attorney fees to a career status state employee who prevailed when respondent-employer appealed OAH's final decision (that the employee was terminated without just cause) to the Court of Appeals. **Hunt v. N.C. Dep't of Pub. Safety, 24.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CRAZIE OVERSTOCK PROMOTIONS, LLC, PLAINTIFF
v.
STATE OF NORTH CAROLINA; AND MARK J. SENTER, IN HIS OFFICIAL CAPACITY AS BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT DIVISION, DEFENDANTS

No. COA18-1034

Filed 18 June 2019

Gambling—electronic gaming machines—sections 14-306.1A and 14-306.4—game of chance

In a declaratory judgment action initiated by an operator of electronic gaming machines, the trial court properly granted summary judgment for the State on the basis that one part of the operator's gaming scheme violated N.C.G.S. § 14-306.4 as a matter of law, because it awarded prizes to patrons in a game involving chance and not skill. However, summary judgment was improperly granted in favor of the State regarding a violation of section 14-306.1A because an issue of fact remained as to whether patrons were required to wager anything of value. The second part of the gaming scheme did not violate either statute because it involved an element of skill.

Judge HAMPSON concurring by separate opinion.

Appeal by Plaintiff from order entered 7 August 2018 by Judge Vince M. Rozier, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 24 April 2019.

Morning Star Law Group, by Keith P. Anthony and William J. Brian, Jr., for the Plaintiff.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga Vysotskaya de Brito, for the State.

DILLON, Judge.

Plaintiff Crazie Overstock Promotions, LLC ("Crazie Overstock"), appeals from an order granting partial summary judgment to Defendants (the "State") on the basis that Crazie Overstock operates a gambling enterprise in violation of Sections 14-306.1A and 14-306.4 of our General Statutes. After careful review, we affirm in part and reverse in part. Specifically, we conclude that Crazie Overstock operates electronic gaming machines in violation of Section 14-306.4, as a matter of law, because these machines award "prizes" to winning patrons in a game of chance. However, we conclude that the State was not entitled to summary judgment as to whether the operation of these machines violates Section 14-306.1A, as there is an issue of fact regarding whether patrons are required to pay consideration for the opportunity to play the machines.

I. Background

In May 2016, Crazie Overstock commenced the underlying action after the State began investigating its retail establishments. In its complaint, Crazie Overstock sought, among other relief, a declaratory judgment that its gaming machines at those establishments were lawful *and* an injunction to prevent the State from interfering with its business.

In July 2018, the State filed a motion for summary judgment. Crazie Overstock voluntarily dismissed its claims against any individual Defendants, leaving only its declaratory judgment and injunctive relief claims pending for trial.

After a hearing on the matter, the trial court granted summary judgment to the State, declaring that Crazie Overstock was violating two of North Carolina's "Lotteries and Gaming" statutes, namely Sections 14-306.1A and 14-306.4. The trial court certified its judgment for immediate appeal. Crazie Overstock timely appealed.

II. Crazie Overstock's Enterprise

Crazie Overstock's enterprise involves two games played on electronic machines: a game of chance followed by a game of skill. These games are played as follows:

Crazie Overstock sells gift certificates which may be used to purchase items from its website or its retail stores. For every ten dollars

($10.00) spent on gift certificates, a patron also receives one thousand (1,000) Game Points. With these Game Points, the patron is eligible to play two games on electronic machines: (1) a game of chance, called the Reward Game, followed by (2) a game of skill, called the Dexterity Game.

In the first game, patrons use their Game Points to play the Reward Game, a game of chance on an electronic machine simulating a traditional slot machine. Patrons wager Game Points for the chance to win Reward Points. If the patron "wins" on a particular play, he or she is awarded a number of Reward Points, equal to some multiple of the Game Points wagered on that winning play. If the patron loses all of his or her plays, he or she is still awarded one hundred (100) Reward Points.

After playing the Reward Game, the game of chance, the patron takes Reward Points earned and wagers them in the Dexterity Game, a game of skill which tests his or her hand-eye coordination. The Dexterity Game involves a simulated stopwatch which repeatedly and rapidly counts up from 0 to 1000 and back down to 0. A patron "wins" Dexterity Points by stopping the stopwatch between 801 and 1000. If a patron stops the stopwatch between 951 and 1000, then one hundred percent (100%) of any wagered Reward Points are converted to Dexterity Points; if between 901 and 950, then ninety percent (90%) of any wagered Reward Points are converted to Dexterity Points; and if between 801 and 900, then fifty percent (50%) of any wagered Reward Points are converted. Dexterity Points are redeemable for cash at a rate of one dollar ($1.00) for every one hundred (100) Dexterity Points. If a patron stops the stopwatch between 0 and 800, he or she does not win any Dexterity Points; but all wagered Reward Points are converted back into Game Points which can be used to play the Reward Game for more chances to try and win Reward Points.[1] The patron, though, is allowed three attempts at stopping the stopwatch with each play, with winnings based on the best result. And the evidence in the record suggests that the Dexterity Game is not all that difficult; over ninety-five percent (95%) of patrons playing the Dexterity Game successfully stop the stopwatch above 800 on at least one of their three tries, and therefore win some amount of money.

By way of example, consider a patron who enters a Crazie Overstock retail establishment and spends one hundred dollars ($100.00) to purchase a one hundred dollar ($100.00) gift certificate. The patron may

1. Crazie Overstock does offer every patron one hundred (100) Game Points per day with no purchase of a gift certificate required. Patrons may also receive one hundred (100) Game Points by requesting these points by mail.

use this gift certificate to purchase merchandise at the establishment or from Crazie Overstock's website. In any event, the patron also receives ten thousand (10,000) Game Points.

The patron uses the ten thousand (10,000) Game Points to play the Reward Game, the game of chance, betting some portion on each play, and either losing the Game Points wagered or winning Reward Points equal to some multiple of the Game Points wagered on that spin. After playing all of ten thousand (10,000) Game Points, the patron is left with some number of Reward Points. Even if the patron loses every play, the patron is still awarded a minimum of one hundred (100) Reward Points.

But assume that the patron is lucky in the Reward Game and has turned ten thousand (10,000) Game Points into twenty thousand (20,000) Reward Points. This lucky patron has essentially won the right to win up to two hundred dollars ($200.00) in the Dexterity Game. In the Dexterity Game, the patron bets all twenty thousand (20,000) Reward Points. If the patron's best score in three attempts is above 950, that patron essentially wins two hundred dollars ($200.00). The lucky patron has doubled his money. If the patron's best result is between 901 and 950, he walks away with one hundred eighty dollars ($180.00). If the patron's best result is between 801 and 900, he breaks even, walking away with one hundred dollars ($100.00). If the patron fails in any attempt to stop the stopwatch above 800, he does not win any Dexterity Points, and therefore no cash, but is awarded twenty thousand (20,000) Game Points, which can be used to again play the Reward Game, the game of chance, with hopes of winning Reward Points and another try at the Dexterity Game.

But even assuming our patron is not lucky in the Reward Game and loses all of his Game Points in that Reward Game of chance, he still receives a minimum of one hundred (100) Reward Points, which can be used to win up to one dollar ($1.00) in cash in the Dexterity Game, thus walking out with ninety-nine dollars ($99.00) less in cash than when he entered.

Therefore, a patron walking into a Crazie Overstock establishment who successfully plays the Reward Game of chance is likely to walk out with some multiple of the money he brought into the store. If he dedicates some amount of money into playing but is not successful in the Reward Game, the patron is likely to walk out with only one dollar ($1.00). In any event, the patron still walks out with gift certificates, redeemable for merchandise on Crazie Overstock's website and at its retail locations. It is unclear how much this merchandise is worth, but evidence in the record suggests that very few gift certificates are actually ever redeemed by patrons.

III. Analysis

Crazie Overstock argues that the trial court erred in granting summary judgment to the State, declaring that Crazie Overstock's program is illegal under Sections 14-306.1A and 14-306.4 of our General Statutes.

We review an order granting summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). A grant of summary judgment is proper when there is no genuine issue of material fact. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2018).

Based on our review of the record, for the following reasons we affirm the grant of summary judgment as to Section 14-306.4; but we agree with Crazie Overstock that it was error for the trial court to grant summary judgment as to Section 14-306.1A and reverse that portion of the order.

Section 14-306.1A prohibits one from placing into operation a video gaming machine which allows a patron to make a wager for the opportunity to win money or another thing of value through a game of chance. N.C. Gen. Stat. § 14-306.1A (2016).

Section 14-306.4 prohibits one from placing into operation an electronic machine which allows a patron, with or without the payment of consideration, the opportunity to win a prize in a game or promotion, the determination of which is based on chance. N.C. Gen. Stat. § 14-306.4 (2016). One key difference between this Section and Section 14-306.1A is that a violation of this Section can occur even if the patron is not required to wager anything for the opportunity to win a prize.

One of the issues on appeal is whether Crazie Overstock operates a "game of skill" rather than a "game of chance," as Sections 14-306.4 and 14-306.1A only proscribe machines where prizes can be won through a game of chance. Our Supreme Court has been rather consistent on the standard to apply in delineating between a game of chance and a game of skill. For instance, in 1848, in holding that bowling is a game of skill, Chief Justice Ruffin took great pains to describe the difference between a "game of chance" and a "game of skill," as follows:

> The phrase, "game of chance," is not one long known in the law and having therein a settled signification, but was introduced into our statute book by the act of 1835. . . . [This term] must be understood [] as descriptive of a certain kind of games of chance in contra-distinction to a certain other kind, commonly known as games of skill. [We hold that] "a game of chance" is such a game, as is

> determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance.

State v. Gupton, 30 N.C. 271, 273-74 (1848). More recently, in a dissent adopted by our Supreme Court, Judge (now Justice) Ervin similarly reasoned that "the essential difference between a game of skill and a game of chance for purposes of our gambling statutes . . . is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill." *Sandhill Amusements, Inc., v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 369, 762 S.E.2d 666, 685 (2014) (Ervin, J., dissenting), adopted by our Supreme Court, 368 N.C. 91, 773 S.E.2d 55 (2015).

As recognized by our Supreme Court, there are elements of "chance" in many "games of skill." For instance, in *Gupton*, Chief Justice Ruffin stated that "an unexpected puff of wind" or "unseen gravel" may turn aside a skillfully tossed ring or ball towards its target, but that such element of chance does not convert a ring toss game or bowling game into a game of chance. *Gupton*, 30 N.C. at 274. Similarly, it has been recognized that there are sometimes elements of skill present in games of chance. *See, e.g.*, *Collins Coin Music Co. of N.C., Inc., v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 409, 451, S.E.2d 306, 308 (1994) (holding that video poker is a game of chance as chance "negates [the] limited skill element"). Ultimately, whether a game is one of chance or one of skill is dependent on which element "is the dominating element that determines the result of the game." *State v. Eisen*, 16 N.C. App. 532, 535, 192 S.E.2d 613, 616 (1972) (recognizing that blackjack has some elements of skill and chance).

In the present case, Crazie Overstock argues that its game is one of skill since skill is the dominating element in determining whether a patron wins money: no matter how lucky a patron is in the first part of the game in racking up Reward Points, the patron can only win money by performing well in the Dexterity Game.

We agree with Crazie Overstock that, though it appears little skill is truly required, its Dexterity Game alone is one of skill, which, by itself, does not violate either Section 14-306.4 or 14-306.1A. Though patrons can win money playing the Dexterity Game, the outcome of the game is dependent primarily on the patrons' ability to react in a timely fashion.

We conclude, however, that Crazie Overstock's Reward Game is a separate game in which patrons have the opportunity to win something of value. And there is no argument that the outcome of the Reward

Game is based on chance, as the game involves a simulated slot machine. Further, we conclude that the Reward Game indeed offers a "prize," that is, something of value. *See* N.C. Gen. Stat. § 14-306.4(a)(4) (2016) (defining "prize[,]" in part, as "anything [] of value"). Namely, lucky patrons win *the opportunity* to play an easy game of skill for money; and this opportunity to win money, itself, is a thing of value.

The exact odds and payouts for a winning spin of the virtual reels in the Reward Game is not in the record. But assume that a patron buys a twenty dollar ($20.00) gift certificate and, thus, receives two thousand (2,000) Reward Points. If the patron risks all these points in a single "spin" and the result is a winning combination which pays double, she is awarded *the opportunity* to play an easy game of skill, the Dexterity Game, where she has a high likelihood of walking away with forty dollars ($40.00). But if the patron's "spin" in the Reward Game results in a losing combination, she is awarded only the opportunity to win one dollar ($1.00) in the Dexterity Game. Thus, in the Reward Game of chance, the patron may win the opportunity to win thirty-nine ($39.00) extra dollars, just for being lucky.

If we were to hold that Crazie Overstock's Reward Game and Dexterity Game were together a game of skill, then our gambling statutes as a whole would be rendered largely meaningless, as illustrated in the following example: The operation of a typical roulette wheel, with eighteen (18) red slots, eighteen (18) black slots, and two green slots, is clearly illegal gambling in North Carolina. For example, an establishment who allows patrons to wager twenty dollars ($20.00) on "red" and then pays those patrons twenty additional dollars ($20.00) if the ball indeed falls into a red slot would be violating our gambling laws. *See* N.C. Gen. Stat. § 14-292 (2016) (proscribing most forms of gambling on games of chance). However, applying the logic of Crazie Overstock's argument, an establishment offering roulette could circumvent our proscription against gambling by simply *not* paying winners an additional twenty dollars ($20.00) in cash but rather award them each *the opportunity* to win an additional twenty dollars ($40.00) in cash by making at least one out of three lay-ups on a three-foot high basketball goal.[2] Such

2. The fact that Crazie Overstock allows "losers" of the Reward Game of chance the opportunity to win one dollar ($1.00) in the Dexterity Game does not change our analysis. In our example, an establishment is still operating an illegal game even if it offers losers the opportunity to win twenty-five (25) cents by making a lay-up, as the odds remain with the establishment.

an outcome is, of course, absurd. Therefore, we must reject Crazie Overstock's analysis.[3]

Our General Assembly has prohibited certain forms of gambling, including certain video games which offers prizes. Such is within the police power of that body. *Hech Techs.*, *Inc. v. State*, 366 N.C. 289, 290, 749 S.E.2d 429, 431 (2012) (recognizing that "[s]ince the founding of this nation, states have exercised the police power to regulate gambling"). It is not for the Courts to legalize gambling video games but rather is within the province of our General Assembly to make that decision.

IV. Conclusion

We, therefore, conclude that the Reward Game violates Section 14-306.4, as a matter of law, as it offers patrons the opportunity to win a "prize," defined, in part, as "anything [] of value," where the outcome is

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3. Even analyzing the Reward Game and the Dexterity Game as a *single* game, as advocated by Crazie Overstock, we conclude that the element of chance overrides any element of dexterity. In reaching this conclusion, we follow the reasoning applied in Judge Ervin's dissent in *Sandhills* that was adopted by our Supreme Court. *Sandhill Amusements*, 236 N.C. App. at 369, 762 S.E.2d at 685 (Ervin, J., dissenting). The game at issue in *Sandhills* involved a video machine displaying a virtual, three-reel slot machine. If the spin produced a winning combination, the player won. In that game, the position of the three reels after a spin was determined totally by chance, but the game also had a skill element. The game allowed the player *after the spin* to then "nudge" one of the reels by one position to produce a different, and perhaps winning, combination. Thus, in some plays, the player had the ability to change a losing spin into a winning spin. Notwithstanding, our Supreme Court still concluded that the game as a whole was one of chance, as a matter of law:

> [U]se of the equipment at issue here will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays. Finally, the extent to which the opportunity arises for the "nudging" activity [to produce a winning combination] appears to be purely chance-based. . . . [T]he only basis for th[e] assertion [that the game was one of skill] was the player's ability to affect the outcome by "nudging" a third symbol in one direction or the other after two matching symbols appeared at random on the screen. Assuming for purposes of argument that this "nudging" process does involve skill or dexterity, I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player's skill and dexterity on the outcome. . . . As a result, for all of these reasons, I am compelled by the undisputed evidence to conclude that the element of chance dominates the element of skill in the operation of Plaintiffs' machines[.]

Id. at 369-70, 762 S.E.2d at 686. In the same way, here, chance determines whether a Crazie Overstock patron will have the opportunity to use dexterity to win any money (over one dollar ($1.00)).

based on chance. N.C. Gen. Stat. § 14-306.4(a)(4). We further conclude that the operation of the Dexterity Game, by itself, does not violate either Section 14-306.4 or 14-306.1A, as a matter of law.

However, there is at least an issue of fact as to whether the Rewards Game violates Section 14-306.1A. One does not violate this Section unless the game of chance requires the patron to wager something of value. And it is unclear whether, here, patrons are required to wager anything of value. Patrons who are awarded two thousand (2,000) Game Points for twenty dollars ($20.00) also receive a twenty dollar ($20.00) gift certificate, redeemable for merchandise.

Accordingly, we affirm summary judgment awarded to the State on the claim under Section 14-306.4 of our General Statutes, as Crazie Overstock's business scheme constitutes an illegal sweepstakes. We reverse summary judgment on the claim for a declaration under Section 14-306.1A, as it is not clear whether payment is required to play the Reward Game. On remand, the trial court may consider whether a trial is necessary or whether this second issue is mooted by our determination that the scheme is otherwise illegal under Section 14-306.4.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judge MURPHY concurs.

Judge HAMPSON concurs by separate opinion.

HAMPSON, Judge, concurring.

I concur with the majority opinion in this case. I write separately to add that, at least in my view, our reversal of summary judgment on the question of whether Crazie Overstock's business model violates N.C. Gen. Stat. § 14-306.1A should not be construed as an indication that Crazie Overstock's business model does not violate N.C. Gen. Stat. § 14-306.1A. Rather, Crazie Overstock has generated a triable issue of fact as to whether the sale of gift certificates, in fact, constitutes the sale of a legitimate product offered in the free marketplace by a business regularly engaged in the sale of such goods or services or whether the sales of these gift certificates constitutes a mere subterfuge for illegal gaming. *See American Treasures, Inc. v. State*, 173 N.C. App. 170, 177, 617 S.E.2d 346, 350 (2005).

Here, Crazie Overstock has forecast evidence that a customer purchasing gift certificates receives the same face value of certificates as

the amount the customer paid (i.e., a $20 payment results in a $20 gift card that may be used to purchase $20 of merchandise, as priced by Crazie Overstock). On the other hand, the State has forecast substantial evidence calling into question the actual value received from the gift card, including, *inter alia*, as to Crazie Overstock's practices in the operation of the retail merchandise component of its business and in the redemption rates of the certificates themselves.

In particular then, at least in part, the question *sub judice* is whether "the price paid for and the value received" from the gift certificates "is sufficiently commensurate to support the determination that the sale of [gift certificates] is not a mere subterfuge to engage in [illegal gaming], whereby consideration is paid merely to engage in a game of chance." *Id.* at 178-79, 617 S.E.2d at 351 (concluding sale of prepaid long-distance phone cards with an attached game piece did not constitute a lottery scheme where the long-distance rate purchased was among the best in the industry).

NHUNG HA AND NHIEM TRAN, PLAINTIFFS
v.
NATIONWIDE GENERAL INSURANCE COMPANY, DEFENDANT

No. COA19-75

Filed 18 June 2019

Insurance—provisional homeowner policy—cancellation—section 58-41-15(c)—furnishing of notice

An insurance company failed to meet the requirements of N.C.G.S. § 58-41-15(c) before cancelling a newly issued homeowner policy where the homeowner never received the cancellation letter, rendering the cancellation ineffective. Under the statute, a policy could be terminated only after "furnishing" notice, which required proof of actual delivery to and/or receipt of the notice by the insured.

Judge TYSON dissenting.

Appeal by plaintiffs from judgment entered 31 August 2018 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 7 May 2019.

John M. Kirby for plaintiff-appellants.

Bailey & Dixon, LLP, by David S. Wisz, for defendant-appellee.

ARROWOOD, Judge.

Nhung Ha ("Ms. Ha") and Nhiem Tran ("Mr. Tran") (collectively, "plaintiffs") appeal from a judgment dismissing their complaint in part, and declaring Nationwide General Insurance Company ("defendant" or "Nationwide") properly cancelled the homeowner's insurance policy it issued to plaintiffs. For the reasons stated herein, we reverse and remand.

I. Background

Mr. Tran contacted Nationwide on or about 1 April 2015 to secure a homeowner's insurance policy for plaintiffs' home. Nationwide issued the policy that same day.

On or about 14 April 2015, Nationwide's underwriting department sent an inspector to plaintiffs' home. The inspector issued a report on 25 April 2015, identifying several hazards he discovered at the home: (1) rotten siding, (2) an unsecured trampoline, and (3) an unfenced inground pool. Based on this report, Nationwide decided to cancel plaintiffs' policy. The underwriter who made this decision contacted Ms. Brenda Elkerson, a Nationwide employee whose job responsibilities include drafting written notices of policy cancellations, and asked her to prepare a notice cancelling plaintiffs' policy. Ms. Elkerson drafted the letter and sent a memo to the agent on plaintiffs' policy regarding the cancellation. The letter of cancellation listed the hazards identified by the inspector as the reason for the policy's cancellation, and explained the specific steps plaintiffs could take to ameliorate the hazards to reinstate coverage. The letter, dated 22 May 2015, gave plaintiffs until 6 June 2015 to address the hazards. If they did not, Nationwide would cancel the policy at 12:01 a.m. on 6 June 2015.

Ms. Elkerson instructed Nationwide's processing department to print the cancellation letter for mailing. The certificate of mail report maintained by Nationwide shows that the cancellation letter was presented for mailing on 22 May 2015. Although the letter was not returned to Nationwide, plaintiffs never received it.

On 24 July 2015, a fire destroyed plaintiffs' home. When plaintiffs contacted Nationwide to file a claim, they were informed they were not insured, as the policy had been cancelled. Thereafter, plaintiffs retained

legal counsel to pursue a claim for reimbursement, which Nationwide denied by letter on 1 October 2015.

Plaintiffs initiated an action against defendant by filing a complaint in Wake County Superior Court on 24 January 2017, seeking damages for breach of contract and a declaratory judgment that Nationwide did not timely and properly cancel the policy. Nationwide answered and asserted a counterclaim requesting a declaratory judgment that it properly cancelled plaintiffs' policy.

The matter came on for hearing before the Honorable Rebecca W. Holt in Wake County Superior Court on 27 August 2018. On 31 August 2018, the trial court entered a judgment dismissing plaintiffs' breach of contract claim, and declaring: "Nationwide has no duty or obligation under the Policy to make payment to the Plaintiffs for the damage to the Residence and its contents which resulted from the loss on the grounds that the Policy was timely and properly cancelled." The trial court taxed the costs of the action to plaintiffs.

Plaintiffs appeal.

II. Discussion

Plaintiffs argue the trial court erred by concluding Nationwide complied with: (1) N.C. Gen. Stat. § 58-41-15(c) (2017), and (2) the insurance policy's termination requirements. Because we agree with plaintiffs that the trial court erred by concluding Nationwide complied with N.C. Gen. Stat. § 58-41-15(c), we reverse and do not reach the second issue on appeal.

"In reviewing a trial judge's findings of fact, we are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the . . . ultimate conclusions of law." *State v. Navarro*, __ N.C. App. __, __, 787 S.E.2d 57, 62 (2016) (citations and internal quotation marks omitted). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

N.C. Gen. Stat. § 58-41-15 governs the cancellation of homeowners' insurance policies. Pursuant to this section, an insurer may only cancel an insurance policy, or renewal thereof "prior to the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured" if the insurer cancels for one of the reasons listed in N.C. Gen. Stat. § 58-41-15(a), which are:

(1) Nonpayment of premium in accordance with the policy terms;

(2) An act or omission by the insured or his representative that constitutes material misrepresentation or nondisclosure of a material fact in obtaining the policy, continuing the policy, or presenting a claim under the policy;

(3) Increased hazard or material change in the risk assumed that could not have been reasonably contemplated by the parties at the time of assumption of the risk;

(4) Substantial breach of contractual duties, conditions, or warranties that materially affects the insurability of the risk;

(5) A fraudulent act against the company by the insured or his representative that materially affects the insurability of the risk;

(6) Willful failure by the insured or his representative to institute reasonable loss control measures that materially affect the insurability of the risk after written notice by the insurer;

(7) Loss of facultative reinsurance, or loss of or substantial changes in applicable reinsurance as provided in G.S. 58-41-30;

(8) Conviction of the insured of a crime arising out of acts that materially affect the insurability of the risk; or

(9) A determination by the Commissioner that the continuation of the policy would place the insurer in violation of the laws of this State;

(10) The named insured fails to meet the requirements contained in the corporate charter, articles of incorporation, or bylaws of the insurer, when the insurer is a company organized for the sole purpose of providing members of an organization with insurance coverage in this State.

N.C. Gen. Stat. § 58-41-15(a)(1)-(10).

A cancellation permitted by N.C. Gen. Stat. § 58-41-15(a):

> is not effective unless written notice of cancellation has been delivered or mailed to the insured, not less than 15 days before the proposed effective date of cancellation. The notice must be given or mailed to the insured, and any designated mortgagee or loss payee at their addresses shown in the policy or, if not indicated in the policy, at their last known addresses. The notice must state the precise reason for cancellation. *Proof of mailing is sufficient proof of notice.* Failure to send this notice to any designated mortgagee or loss payee invalidates the cancellation only as to the mortgagee's or loss payee's interest.

N.C. Gen. Stat. § 58-41-15(b) (emphasis added). However, N.C. Gen. Stat. § 58-41-15(b)

> does not apply to any insurance policy that has been in effect for less than 60 days and is not a renewal of a policy. That policy may be cancelled for *any reason by furnishing* to the insured at least 15 days prior *written notice of and reasons for cancellation.*

N.C. Gen. Stat. § 58-41-15(c) (emphasis added). The failure to comply with the statutory requirements for cancelling an insurance policy renders the cancellation ineffective. *Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 259, 382 S.E.2d 745, 751-52 (1989).

Here, the trial court found that plaintiffs "did not receive the cancellation letter." But the trial court concluded that Nationwide proved by a preponderance of the evidence that it complied with N.C. Gen. Stat. § 58-41-15(c), explaining:

> Although [sub]section (c) does not include the language,[ ] ["]proof of mailing is sufficient proof of notice", that language is included in [sub]section (b). Reading the statute as a whole and giving the term "furnishing" it's [*sic*] ordinary meaning – "to provide, supply of equip [*sic*], for the accomplishment of a particular purpose" (Black's Law Dictionary 608 – 5[th] ed. 1979), this Court finds that the proof of mailing by Nationwide is sufficient notice under the statute. This Court declines to interpret the statute to require Nationwide to prove actual knowledge on the part of the insureds.

It is undisputed that the cancellation of plaintiffs' policy is controlled by N.C. Gen. Stat. § 58-41-15(c): the policy was in effect less than 60 days and was not the renewal of a policy. However, plaintiffs contend the trial court erred by concluding proof of mailing provided sufficient notice to the insured under this subsection. Instead, plaintiffs argue, subsection (c)'s use of the statutory term "furnishing" required actual delivery to and/or receipt of the notice by the insured. We agree.

N.C. Gen. Stat. § 58-41-15 does not define "furnishing[,]" and no case law in North Carolina directly addresses what is required for an insurer to "furnish" notice of cancellation. The only North Carolina case that addresses the definition of "furnishing" is *Queensboro Steel Corp. v. E. Coast Mach. & Iron Works, Inc.*, 82 N.C. App. 182, 346 S.E.2d 248 (1986). However, *Queensboro* is not controlling here, as it involved this Court's interpretation of the term "furnish" in the context of a materialman's lien statute claim under Chapter 44A of the General Statutes, and the relevant statute specifically required furnishing "at the site[.]" *See id.* at 184, 346 S.E.2d at 250 (analyzing N.C. Gen. Stat. § 44A-10 (2017)). Nonetheless, as in *Queensboro*, the language before our Court in the instant case is ambiguous, and therefore subject to judicial determination of legislative intent.

As this Court explained in *Queensboro*, "[g]enerally, words in a statute that have not acquired a technical meaning must be given their natural, approved, and recognized meaning. In determining whether statutory language is ambiguous, and therefore subject to judicial determination of legislative intent, courts may consult a dictionary." *Id.* at 185, 346 S.E.2d at 250 (citations and internal quotation marks omitted). Black's Law Dictionary defines furnish, in a legal context, as "[t]o supply, provide, or equip, for accomplishment of a particular purpose." *Id.* at 185-86, 346 S.E.2d at 250 (quoting Black's Law Dictionary 608 (5th ed. 1979)); *see* Webster's College Dictionary 588 (2014) (defining "furnish" as "to supply, provide, or equip with whatever is necessary. . . .").

Given the lack of a statutory definition and the dictionary definition of "furnish," it is not clear whether the legislature, by requiring the insurer "furnish" notice, intended to require actual delivery to and/or receipt of the notice by the insured. Another reasonable interpretation, as argued by defendant, is that proof of mailing is sufficient to "furnish" notice under the statute. Therefore, we conclude the statutory language is ambiguous and we must consider relevant canons of statutory interpretation. *See Purcell v. Friday Staffing*, 235 N.C. App. 342, 347, 761 S.E.2d 694, 698 (2014) ("When . . . a statute is ambiguous, judicial

construction must be used to ascertain the legislative will." (citation and internal quotation marks omitted)).

"Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 483, 810 S.E.2d 217, 222 (2018) (citation and internal quotation marks omitted). Accordingly, we read N.C. Gen. Stat. § 58-41-15 holistically to determine whether the trial court erred by concluding proof of mailing provided sufficient notice to the insured under subsection (c) of this statute.

Subsection (c) clearly varies from subsection (b), and, because we "presume[ ] that the Legislature acted with full knowledge of prior and existing law[,]" *see Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977), we must presume that this variation is meaningful. As such, "proof of mailing" must be different from "furnishing" notice. After all, if the General Assembly intended for proof of mailing to be sufficient under subsection (c), they could have included the express language found in subsection (b) in subsection (c). Instead, the General Assembly provided two different standards for notice.

Defendant does not dispute there is variation between the standards for notice in subsection (b) and (c). However, defendant argues that, reading the statute holistically, subsection (c) does not require as much notice as subsection (b). Therefore, defendant contends, the use of "furnish" in subsection (c) must suggest something less than proof of mailing, which the plain language of the statute states is sufficient to provide notice under subsection (b). In support of this argument, defendant argues the General Assembly would require less notice for cancellations of policies pursuant to subsection (c) because policies cancelled under subsection (c) are either not renewals, or have not been in effect longer than 60 days, or both. In contrast, policies cancelled pursuant to subsection (b) are either renewals, or have been in effect for longer than 60 days. We disagree.

Subsection (b) provides for notice of cancellation to insureds who have committed an offense listed in subsection (a); thus, these insureds are likely aware both that they are noncompliant with the policy, and also that the policy could be terminated based on this act. In contrast, subsection (c) provides for notice of cancellation of policies for any reason. As such, it stands to reason that termination under this subsection requires more notice, as an insured could be caught completely unaware

by a termination of a policy pursuant to subsection (c). Therefore, we hold proof of mailing is not sufficient to "furnish" notice of cancellation to insureds under N.C. Gen. Stat. § 58-41-15(c).

Furthermore, the statute at issue is remedial, and intended to protect insureds from in-term policy cancellations without notice; therefore, we construe the statute in favor of finding coverage. *See Metro. Prop. & Cas. Ins. Co. v. Caviness*, 124 N.C. App. 760, 764, 478 S.E.2d 665, 668 (1996). Toward that end, the purpose of the statute is best served when every provision of the Act is interpreted to provide an insured with the fullest possible protection. It follows that the required notice of cancellation to insureds who are innocent of wrongdoing would not be less than notice to those insureds whose policies are cancelled under subsection (b), based on a bad act listed in subsection (a), such as "[s]ubstantial breach of contractual duties, conditions, or warranties that materially affects the insurability of the risk;" or "[a] fraudulent act against the company by the insured or his representative that materially affects the insurability of the risk[.]" N.C. Gen. Stat. § 58-41-15(a)(4)-(5). Accordingly, subsection (c), which provides for the cancellation of policies for any reason, must be afforded the fullest possible protection.

Therefore, subsection (c)'s requirement that the insurer "furnish" notice of cancellation must mean something more than "proof of mailing." Considering this conclusion in light of the dictionary definition of furnishing, "[t]o supply, provide, or equip, for accomplishment of a particular purpose[,]" we hold the statute requires actual delivery to and/or receipt of the notice by the insured.

Because the facts before us demonstrate nothing more than that Nationwide provided "proof of mailing[,]" and the trial court expressly found plaintiffs did not receive notice, Nationwide failed to afford plaintiffs sufficient notice of the policy's cancellation. As a result, the cancellation was ineffective, *Pearson*, 325 N.C. at 259, 382 S.E.2d at 751-52, and the trial court erred by concluding Nationwide complied with the provisions of N.C. Gen. Stat. § 58-41-15(c).

III. Conclusion

For the foregoing reasons, we reverse and remand for the trial court to consider the matter consistent with this opinion.

REVERSED AND REMANDED.

Judge INMAN concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

Sympathetic facts result in bad precedents. All evidence presented at trial shows Nationwide General Insurance Company ("Nationwide" or "defendant") timely and correctly furnished notice of cancellation to plaintiffs, Ha and Tran. Nationwide's actions and notice fully complied with N.C. Gen. Stat. § 58-41-15 and with the requirements of the policy agreed to by plaintiffs.

The trial court properly determined Nationwide had furnished notice to plaintiffs concerning the impending termination of plaintiffs' policy. The trial court's conclusions of law are supported by its findings and the evidence at trial and its order is properly affirmed. I respectfully dissent from the majority's opinion.

I. Factual Background

The majority's opinion fails to include relevant evidence and events the trial court found and upon which it entered judgment for defendant. An excess premium check for $89.50 was refunded by Nationwide and returned to plaintiffs on 8 June 2015. Pursuant to its policy, Nationwide "returned a pro rata portion of the premium" which also contained the policy number affiliated with plaintiffs' home insurance policy. Nationwide's policy includes printing the policy number on each check to distinguish it from other insurance policies.

Plaintiffs initially denied receipt of this premium refund, but later conceded they had, in fact, received and cashed the check. Nationwide submitted a copy of the cancelled premium refund check with the policy number thereon, and authenticated plaintiffs' signature thereon. After having mailed the premium refund check, Nationwide also discontinued withdrawing policy payments from plaintiffs' checking account. None of these undisputed facts are set out in the majority's opinion.

The majority's opinion also provides only a cursory overview of Nationwide's process to mail notices. The testimony describes Nationwide's extensive mailing protocol. This process includes "an employee from the processing department hand-delivering" the notices of cancellation to "a mailroom employee along with a Certificate of Mail Report." Accompanying the Certificate of Mail Report, was a "manifest listing each cancellation letter with an individual article number and the addressee."

Next, the mailroom employee matches the manifest and the letters, folds the letters by hand, and places the letters into the properly addressed and stamped envelopes. Before delivering the letters to the post office, the mailroom employee counts the number of envelopes to account for all pieces of mail. The 22 May 2015 Certificate of Mail Report, which specifically includes the letter mailed to plaintiffs, shows 510 cancellation letters were presented to the United States Postal Service. This document included Ha's name, address, and policy number. The detailed protocol insures each piece of mail is sent to the proper address. The premium check sent to plaintiffs and was cashed more than six weeks prior to plaintiffs' loss.

II. Cancellation of Policy

A. Statutory Requirements

The trial court correctly determined the undisputed timeline of this case. On 1 April 2015, Nationwide effectuated a provisional homeowner's insurance policy for plaintiffs. Plaintiffs agreed to pay premiums by automatic draft from their checking account. A Nationwide representative left a voicemail on 10 April 2015 at the number plaintiffs had provided, advising plaintiffs of a routine inspection of their home.

Nationwide inspected plaintiffs' premises on 14 April 2015 and identified several hazards. On 22 May 2015, Nationwide "furnished" and mailed written notice of policy cancellation. The notice of cancellation indicated the policy would terminate on 6 June 2015 at 12:01 a.m.

Our general statutes provide that no insurance provider may cancel a policy without the insured's consent outside an enumerated list of ten specified exceptions. N.C. Gen. Stat. § 58-41-15(a) (2017) ("No insurance policy or renewal thereof may be cancelled by the insurer prior to the expiration of the term or anniversary date stated in the policy and without the prior written consent of the insured, *except* for any one of the following [ten] reasons" (emphasis supplied)). This non-cancellation provision prior to the expiration of the term specifically

> *does not apply* to any insurance policy that has been in effect for less than 60 days and is not a renewal of a policy. That policy may be cancelled *for any reason by furnishing* to the insured at least 15 days prior written notice of and reasons for cancellation.

N.C. Gen. Stat. § 58-41-15(c) (2017) (emphasis supplied).

This statute plainly indicates section (c) applies to insureds, like plaintiffs, whose policies have been provisionally initiated or insured within the previous sixty-day period. Based upon the stipulated timeline, the policy had been in effect for 51 days when Nationwide furnished notice to plaintiffs to cancel the policy. It is undisputed and the majority's opinion acknowledges defendant's cancellation of plaintiffs' policy clearly falls within N.C. Gen. Stat. § 58-41-15(c), because the policy had been in effect "for less than 60 days." *Id.* Here, Nationwide properly cancelled the policy within the first sixty days of issuance. Nationwide is not limited by the enumerated reasons for cancellation, but rather maintained the absolute right to cancel the policy "for any reason." *Id.*

The stipulated timeline also indicates the notice of cancellation fully complied with the statutory requirement of fifteen days' prior written notice to the insured before cancellation became effective. The trial court properly found and the majority's opinion concedes that Nationwide fully complied with the plain terms of the controlling statute.

B. "Furnishing" Notice

The majority's opinion erroneously concludes the word "furnish" must be interpreted to mean Nationwide must prove actual delivery to and receipt of a cancellation letter by plaintiffs. No binding precedents interpret how "furnish" is to be defined in the context of N.C. Gen. Stat. § 58-41-15. The majority's opinion notes the only North Carolina case that addresses the definition of "furnish" is *Queensboro Steel Corp. v. E. Coast Mach. & Iron Works, Inc.*, 82 N.C. App. 182, 346 S.E.2d 248 (1986). The majority's opinion acknowledges *Queensboro Steel* does not control here because it pertains to the Court's interpretation of the term "furnish" within Chapter 44A of the General Statutes which focuses on materialman's and mechanic's liens.

In reviewing questions of statutory intent and meaning, "[t]he primary objective of statutory interpretation is to give effect to the intent of the legislature." *Purcell v. Friday Staffing*, 235 N.C. App. 342, 346, 761 S.E.2d 694, 698 (2014). If statutory language is ambiguous, this Court should analyze the entire statute in order to determine legislative intent. *See id.* at 347, 761 S.E.2d at 698 ("When . . . a statute is ambiguous, judicial construction must be used to ascertain the legislative will.").

The majority's opinion asserts the statutes must be viewed holistically to determine the intent of the legislature. *See N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 483, 810 S.E.2d 217, 222 (2018) ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter

to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

This Court can deduce the intent of the legislature by considering the entire text of the statute and comparing the language of two distinct sections. N.C. Gen. Stat. § 58-41-15(a) requires actual notice by way of the insured's consent where an insurance company terminates a non-provisional policy prior to its stated expiration.

Section (c) of the statute only requires the insurer to furnish notice of cancellation to an insured under a policy "that has been in effect for less than 60 days." The legislature could have written the statute to require the insurer to prove actual notice and receipt. *See* N.C. Gen. Stat. § 58-36-105 (2017) (governing the cancellation of worker's compensation insurance policies and requiring that a written notice of cancellation must be sent by registered or certified mail, return receipt requested, with the policy remaining in effect "until such method is employed and completed"); *see also* N.C. Gen. Stat. § 58-36-85 (2017) (requiring the cancellation of personal motor vehicle insurance policies be sent by first-class mail and providing the insured ten days from receipt of the notice to request review by the Department of Insurance).

Instead, section (c), which applies to provisional and newly issued policies "that has been in effect for less than 60 days," such as plaintiffs' policy, plainly and unambiguously requires notice of cancellation to be furnished. As the majority's opinion concedes, the language distinguishing sections (a) and (c) in the statute indicates the General Assembly's intention to provide "two different standards for notice" to policy holders.

"In a legal context, 'furnish' means '[t]o supply, provide, or equip, for the accomplishment of a particular purpose.' " *Queensboro Steel*, 82 N.C. App. at 185-86, 346 S.E.2d at 250 (quoting *Black's Law Dictionary* 608 (5th ed. 1979)). English language dictionary definitions are similar. *See Webster's New World College Dictionary* 588 (5th ed. 2014) ("to supply; provide; give)." Applying the plain meaning of "furnish" or "furnishing," and reading the statute as a whole, led the trial court to correctly conclude the insurer's undisputed proof of mailing satisfies proof of notice.

The General Assembly clearly enacted two different standards of notice. Section (a) requires signed consent and acknowledgment of a cancellation from an insured. Section (c) requires that an insurance company "furnish" or provide notice. In this case, Nationwide acted in accordance with the statute by *providing* or furnishing notice via the United States Postal System to the address plaintiffs had provided.

Requiring the insurer to additionally prove actual receipt of the cancellation letter by the insured is not required by statute.

In *Allstate Ins. Co. v. Nationwide Ins. Co.*, this Court rejected the notion the insured must be provided actual notice. *Allstate Ins. Co. v. Nationwide Ins. Co.*, 82 N.C. App. 366, 346 S.E.2d 310, (1986). This Court held a cancellation was effective because "[u]nder North Carolina law, and under the policy language contained in the policy at issue, proper mailing of the cancellation notice is all that is required to cancel the policy." *Id.* at 369-70, 346 S.E.2d at 312-313.

Here, Nationwide properly followed the plain meaning of the statute by using its mailing protocol to timely cancel this policy. Nationwide need not guarantee receipt by plaintiffs. Had the General Assembly wanted to burden an insurer under the facts before us with the additional responsibility of proving actual receipt by the insured, it clearly knew how to so require and would have drafted and enacted the statute to so provide. The trial court properly concluded Nationwide's proof of mailing sufficiently satisfied the statutory requirements.

C. Nationwide's Policy

Similar to N.C. Gen. Stat. § 58-41-15, Nationwide's policy grants it the absolute right to cancel a policy within sixty days of issuance:

> 2. We may cancel this policy only for the reasons stated below by letting you know in writing of the date cancellation takes effect. This cancellation notice may be delivered to you, or mailed to you at your mailing address shown in the Declarations. *Proof of mailing will be sufficient proof of notice.*
>
> . . . .
>
> (b) When this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel *for any reason* by letting you know at least 10 days before the date cancellation takes effect.

Plaintiffs' assertion that they never received the letter is not determinative of this issue. The testimony at trial indicates Nationwide used a mailing system and protocols to ensure each piece of mail, especially those containing important notices such as notices of cancellation, were furnished to the insured that evidences the statutory and policy requirements. Nationwide provided prior written notice to the plaintiffs of the impending policy cancellation by mailing a letter explaining the

policy would be terminated. The policy explicitly stated proof of mailing served as proof of sufficient notice. Although plaintiffs purportedly never received the letter, detailed testimony of the mailing protocol, the cashed premium check, and the discontinued drafting from plaintiffs' account corroborates the proper cancellation under the policy and the statute.

The "mailbox rule" also "creates a rebuttable presumption that an envelope sent via the postal service with proper postage was delivered to the intended party." *Nationwide Prop. & Cas. Ins. Co. v. Martinson*, 208 N.C. App. 104, 116, 701 S.E.2d 390, 398 (2010) (citations omitted). Here, the testimonial evidence shows the cancellation letter had been sent with the proper postage to plaintiffs' address.

In accordance to the mailbox rule, there is a rebuttable presumption the letter sent via the Nationwide mailing procedures through the postal service was delivered to plaintiffs. *Id.* Plaintiffs failed to rebut this presumption and explain their cashing of the returned premium check for this policy and the discontinued drafting of premiums from their checking account.

The impact of the majority's interpretation of "furnishing" to require actual receipt of cancellation notice by plaintiffs of policies issued less than sixty days will decrease the willingness of insurers to provide immediately binding insurance coverage. Judicially imposing a requirement on insurers to guarantee delivery to or receipt of a cancellation letter during underwriting of new policies issued less than sixty days will lead to greater costs and decreased availability of insurance coverage.

These added costs of guaranteed receipt to cancel by the insurer will inevitably be passed onto consumers. Imposing judicially required certified mailing or other independent verification also interferes with the insurance company's policy and the parties' freedom of contract.

III. Conclusion

N.C. Gen. Stat. § 58-41-15(c) provides that a policy, which has been in effect for less than sixty days, may be cancelled for any reason so long as the insurer furnishes prior written notice. Nationwide properly provided notice by timely mailing a letter of notification to plaintiffs.

The plain meaning of the words "furnish" or "furnishing" does not include nor compel actual "delivery to" or "receipt of" notice as the majority's opinion holds. Furnish means "to provide." In mailing the letter to the designated address, Nationwide clearly provided and furnished

timely notice to plaintiffs, effectively and timely cancelling their policy and giving them the opportunity to pursue other insurance coverage.

The trial court correctly found the policy had been cancelled effective 6 June 2015 in compliance with N.C. Gen. Stat. § 58-41-15 and with terms of the Nationwide policy. The trial court's order is correctly affirmed. I respectfully dissent.

JEFFREY HUNT, PETITIONER
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA18-1195

Filed 18 June 2019

Administrative Law—attorney fees—appellate—authorized by plain language of statute

Pursuant to the plain language of N.C.G.S. § 126-34.02(e), the Office of Administrative Hearings (OAH) had authority to award appellate attorney fees to a career status state employee who prevailed when respondent-employer appealed OAH's final decision (that the employee was terminated without just cause) to the Court of Appeals.

Appeal by respondent from order entered 24 August 2018 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 21 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for the State.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner.

The McGuinness Law Firm, by J. Michael McGuinness, for amicus curiae North Carolina Police Benevolent Association and Southern States Police Benevolent Association.

ARROWOOD, Judge.

The North Carolina Department of Public Safety ("DPS" or "respondent") appeals from an order of the North Carolina Office of Administrative

Hearings (the "OAH") granting Jeffrey Hunt ("petitioner")'s petition for appellate attorneys' fees. For the reasons stated herein, we affirm the order of the administrative law judge ("ALJ").

I. Background

In November 2016, petitioner was a career status State employee, working for DPS as a correctional officer at Scotland Correctional Institution. Petitioner's unit manager, Ms. Queen Gerald, requested a meeting with petitioner on 3 November 2016. During the meeting, Ms. Gerald informed him that she was investigating his alleged absence from work on 18 August 2016. She asked him to sign paperwork regarding the absence. Petitioner refused, and became upset. He said he was tired of "this s***" and stated either "I quit" or "I'm quitting" before walking out of the prison, through the main door. Instead of "swiping out" at the security checkpoint, petitioner informed the officer-in-charge that he had resigned.

On 9 November 2016, petitioner spoke with the Superintendent at Scotland Correctional Institution, Ms. Katy Poole, by telephone. Petitioner asked Ms. Poole if he could return to work. In response, Ms. Poole asked whether petitioner was rescinding his resignation. Petitioner replied, "Yes." Ms. Poole informed him that she had already accepted his resignation, and was unwilling to rescind it based on "his history of pending investigations and corrective actions[,]" and his behavior on 3 November 2016. That same day, petitioner received a letter confirming he tendered his resignation on 3 November 2016. Although petitioner attempted to use DPS's internal grievance procedure, he was notified that the agency would not process his grievance because he had resigned from employment.

Petitioner filed a petition for a contested case hearing in the OAH on 22 February 2017. The matter came on for hearing before ALJ Melissa Owens Lassiter on 15 June 2017. The ALJ issued a final decision pursuant to N.C. Gen. Stat. § 150B-34 on 17 August 2017, holding petitioner was terminated without just cause because petitioner "never submitted a verbal statement of resignation to any DPS employee authorized to accept it." Accordingly, the ALJ ordered that petitioner be reinstated and receive back pay. After the issuance of the final decision, petitioner filed a petition for attorneys' fees, which the ALJ granted in an order entered 28 August 2017. The order awarded $11,720.00 in attorneys' fees and $20.00 in filing fees. Respondent appealed.

Our Court affirmed the ALJ's final decision in *Hunt v. N.C. Dep't of Pub. Safety* ("*Hunt I*"), __ N.C. App. __, 817 S.E.2d 257 (2018).

Following the entry of *Hunt I* in the OAH, petitioner filed a petition for attorneys' fees incurred during petitioner's appeal. Petitioner argued the OAH had the authority to grant this petition pursuant to N.C. Gen. Stat. § 126-34.02(e). The OAH granted the petition and awarded petitioner $14,700.00 in attorneys' fees.

Respondent appeals.

II. Discussion

Respondent argues the OAH erred by awarding appellate attorneys' fees absent statutory authority. Alternatively, respondent argues an award of appellate attorneys' fees was not warranted because the agency had substantial justification to appeal the underlying order. We disagree with both arguments.

A. Standard of Review

"Chapter 150B, the Administrative Procedure Act, specifically governs the scope and standard of this Court's review of an administrative agency's final decision." *Harris v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 798 S.E.2d 127, 132, *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142 (2017). Chapter 150B provides:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017). "The standard of review is dictated by the substantive nature of each assignment of error." *Harris*, __ N.C. App. at __, 798 S.E.2d at 132 (citing N.C. Gen. Stat. § 150B-51(c)).

"[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Id.* (citation and internal quotation marks omitted).

B. Statutory Authority to Award Appellate Attorneys' Fees

"In 2013, our General Assembly significantly amended and streamlined the procedure governing state employee grievances and contested case hearings, applicable to cases commencing on or after 21 August 2013." *Id.* at __, 798 S.E.2d at 131. Prior to these amendments, appeal of a final agency decision of the OAH was controlled by Chapter 150B, which provides:

> [a]ny party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute. . . .

N.C. Gen. Stat. § 150B-43 (2017). Under N.C. Gen. Stat. § 150B-45, appeal of a final agency decision of the OAH is to the superior court. N.C. Gen. Stat. § 150B-45(a) (2017).

Prevailing petitioners in personnel cases brought pursuant to Chapter 150B, prior to the 2013 amendments, were able to recover attorneys' fees at both the OAH and the superior court. The OAH had jurisdiction to award attorneys' fees for the attorneys' work related to the case before the OAH under N.C. Gen. Stat. § 150B-33(b)(11), which provides:

> (b) An administrative law judge may:
>
> . . . .
>
> (11) Order the assessment of reasonable attorneys' fees . . . against the State agency involved in contested cases decided under this Article where the administrative law judge finds that the State agency named as respondent has substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously or under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.

N.C. Gen. Stat. § 150B-33(b)(11) (2017). In contrast, the superior court had jurisdiction to award attorneys' fees for the attorneys' work related to the case before the superior court, as well as for the fees related to appeals before the Court of Appeals and the Supreme Court, pursuant to N.C. Gen. Stat. § 6-19.1, which provides:

> (a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State *or brought by a party who is contesting State action pursuant to G.S. 150B-43* or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. The party shall petition for the attorney's fees within 30 days following final disposition of the case. The petition shall be supported by an affidavit setting forth the basis for the request.

N.C. Gen. Stat. § 6-19.1(a) (2017) (emphasis added).

As part of the 2013 amendments, the General Assembly enacted N.C. Gen. Stat. § 126-34.02(a) and (e). N.C. Gen. Stat. § 126-34.02(a) provides, in relevant part, "[a]n aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a)." N.C. Gen. Stat. § 126-34.02(a) (2017). Thus, the superior court no longer reviews the OAH's final decisions in State personnel appeals in cases commenced after 21 August 2013. Instead, final decisions in State personnel actions are now appealed directly to the Court of Appeals. *See Swauger v. Univ. of N. Carolina at Charlotte*, __ N.C. App. __, __, 817 S.E.2d 434, 437 (2018).

Subsection (e) authorizes the OAH to award attorneys' fees. Specifically, the subsection states: "The Office of Administrative Hearings may award attorneys' fees to an employee where reinstatement or back pay is ordered or where an employee prevails in a whistleblower grievance. The remedies provided in this subsection in a whistleblower appeal shall be the same as those provided in G.S. 126-87." N.C. Gen. Stat. § 126-34.02(e).

The ALJ in the instant case determined that N.C. Gen. Stat. § 126-34.02(e) authorizes the OAH to award attorneys' fees and costs for both the administrative and the appellate portions of contested cases. On appeal, respondent argues the ALJ erred by reaching this conclusion because N.C. Gen. Stat. § 126-34.02(e) does not grant the OAH the authority to award attorneys' fees and costs for the appellate portion of a contested case. We disagree.

"Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo. The principal goal of statutory construction is to accomplish the legislative intent." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018) (citation and internal quotation marks omitted).

> When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself: When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.

State v. Ward, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (citation and internal quotation marks omitted).

Here, the plain language of N.C. Gen. Stat. § 126-34.02(e) authorizes the OAH to "award attorneys' fees to an employee where reinstatement or back pay is ordered or where an employee prevails in a whistleblower grievance." N.C. Gen. Stat. § 126-34.02(e). Significantly, the plain language does not limit the OAH's authority to award attorneys' fees to the administrative portion of a contested case before the OAH, nor does it prohibit the OAH from awarding attorneys' fees incurred during judicial review before this Court or our Supreme Court, taken pursuant to N.C. Gen. Stat. § 126-34.02(a). Therefore, we do not read these limitations

into the statute. We conclude the OAH has the authority to award attorneys' fees for both the administrative portion of a contested case before the OAH, and for the attorneys' fees incurred during judicial review of the OAH's final decision.

The plain language of the second sentence of subsection (e) further evidences that the statute expands the OAH's authority to award attorneys' fees by authorizing remedies where an employee prevails in the appeal of a whistleblower grievance: "The remedies provided in this subsection in a whistleblower *appeal* shall be the same as those provided in G.S. 126-87." N.C. Gen. Stat. § 126-34.02(e) (emphasis added). At the same time the General Assembly enacted this statutory change, it made a significant contemporaneous change to the whistleblower law, amending N.C. Gen. Stat. § 126-86 (2013).

Prior to the 2013 changes, State employees had the discretion to pursue a whistleblower claim in superior court under N.C. Gen. Stat. § 126-85, or in the OAH under N.C. Gen. Stat. § 126-34.1, but not in both. *Swain v. Elfland*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535 (2001). If the employee brought the action in the OAH, the employee would not be able to seek recovery of the remedies in N.C. Gen. Stat. § 126-87, which include treble damages and injunctive relief; whereas, the superior court was authorized, pursuant to N.C. Gen. Stat. § 126-87, to allow the recovery of these remedies.

However, in 2013, the General Assembly amended the whistleblower statute, N.C. Gen. Stat. § 126-86. *See* S.L. 2013-382, § 7.10, eff. Aug. 21, 2013. It now states, "Any State employee injured by a violation of G.S. 126-85 who is *not subject to Article 8 of this Chapter* may maintain an action in superior court for damages, an injunction, or other remedies provided in this Article. . . ." N.C. Gen. Stat. § 126-86 (2017) (emphasis added). Thus, State employees subject to Article 8 of Chapter 126 now must pursue a whistleblower claim in the OAH. By simultaneously amending N.C. Gen. Stat. § 126-86 and enacting N.C. Gen. Stat. § 126-34.02(e), the General Assembly ensured remedies described by N.C. Gen. Stat. § 126-87 are still available to these claimants.

These corresponding changes are significant to the case at hand because they expanded the OAH's authority to award attorneys' fees in whistleblower appeals. Therefore, because "words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent, while avoiding absurd or illogical interpretations," it is clear the General Assembly authorized the OAH to award

attorneys' fees not only for fees incurred during whistleblower appeals, but also for fees incurred during appeals of contested cases where reinstatement or back pay is ordered. *Fort v. Cty. of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (2012) (citations and internal quotation marks omitted).

To determine otherwise, and accept respondent's argument on appeal that N.C. Gen. Stat. § 126-34.02(e) does not authorize the OAH to award attorneys' fees for fees incurred during appeals of contested cases where reinstatement or back pay is ordered, and only authorizes the OAH to award attorneys' fees for the administrative portion of a contested case, would interpret the law in a way that renders the General Assembly's actions meaningless The OAH already had the authority to award attorneys' fees for the administrative portion of a contested case pursuant to N.C. Gen. Stat. § 150B-33, so N.C. Gen. Stat. § 126-34.02(e) would have no effect on the law if read in accord with respondent's argument. We decline to read the statute in this way, as our Court "presume[s] that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein." *Fort*, 218 N.C. App. at 407, 721 S.E.2d at 355 (citation and internal quotation marks omitted).

Furthermore, to agree with respondent that subsection (e) of N.C. Gen. Stat. § 126-34.02 does not allow a method of recovering fees for the appellate portion of contested cases would mean the General Assembly intended that State employees who successfully defended appeals against State agencies would have no method of recovering attorneys' fees incurred on appeal. This interpretation would harm the fair administration of justice, as it would drastically impair an employee's ability to contest State action in appellate courts.

Therefore, we hold N.C. Gen. Stat. § 126-34.02(e) authorizes the OAH to award attorneys' fees for the appellate or judicial review portion of a contested case. Respondent's argument is without merit.

C. Award of Attorneys' Fees

We now turn to respondent's alternative argument that attorneys' fees were not warranted. Respondent contends the attorneys' fees were not warranted because: (1) Chapter 126 did not grant the OAH the authority to award appellate fees, so it does not provide an analytical framework for such an award; and (2) even assuming *arguendo* it is appropriate for the OAH to evaluate the propriety of appellate attorneys' fees under N.C. Gen. Stat. § 6-19.1, the agency had substantial justification to appeal the OAH's order reinstating petitioner and awarding back pay in the instant case.

We disagree. As discussed *supra*, N.C. Gen. Stat. § 126-34.02(e) authorizes the OAH to award attorneys' fees for the appellate or judicial review portion of a contested case. Additionally, the ALJ's order awarding attorneys' fees was not made pursuant to N.C. Gen. Stat. § 6-19.1. Rather, it was made pursuant to N.C. Gen. Stat. § 126-34.02(e). Therefore, respondent's argument is without merit.

Although not raised by respondent as an issue on appeal, and therefore waived, we find it pertinent to address the standard the ALJ utilized to determine reasonable attorneys' fees in this case. The ALJ applied the twelve "*Johnson* factors" set forth in *Johnson v. Georgia Highway Exp. Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), which was adopted by the Fourth Circuit. *Grissom v. The Mills Corp.*, 549 F.3d 313, 321 (4th Cir. 2008). These factors have been summarized by the Fourth Circuit as:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Id. (citation and internal quotation marks omitted).

North Carolina courts do not use these factors to determine reasonable attorneys' fees. Instead, it is well-established that the correct standard is as follows: A court's decision to grant attorneys' fees is discretionary. *Stilwell v. Gust*, 148 N.C. App. 128, 130, 557 S.E.2d 627, 629 (2001). However, if attorneys' fees are awarded, the court "must make findings of fact to support the award. These findings must include the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Id.* at 131, 557 S.E.2d at 629 (citations and internal quotation marks omitted). Although these findings are contemplated by the *Johnson* factors, our State has not adopted the *Johnson* framework. Therefore, the ALJ should not have applied *Johnson* to determine the reasonable attorneys' fees in this case. Nevertheless, respondent did not raise this argument on appeal, and it is waived.

III. Conclusion

For the foregoing reasons, we affirm the ALJ's order allowing petitioner's petition for appellate attorneys' fees.

AFFIRMED.

Chief Judge McGEE and Judge ZACHARY concur.

IN THE MATTER OF D.A.Y.

No. COA18-1226

Filed 18 June 2019

Termination of Parental Rights—subject matter jurisdiction—Uniform Child Custody Jurisdiction and Enforcement Act—initial custody determination in out-of-state court

The trial court lacked subject matter jurisdiction to terminate a mother's parental rights where a California court had entered an initial child custody determination regarding the child, the California court did not determine it no longer had exclusive, continuing jurisdiction or that North Carolina would be a more convenient forum (N.C.G.S. § 50A-203(1)), and the mother had resided in California throughout the duration of the termination proceedings (N.C.G.S. § 50A-203(2)).

Appeal by respondent-mother from order entered 4 September 2018 by Judge John R. Nance in Stanly County District Court. Heard in the Court of Appeals 30 May 2019.

David A. Perez for petitioner-father appellee.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Joyce L. Terres, for respondent-mother appellant.

TYSON, Judge.

Respondent-mother appeals from an order terminating her parental rights in D.A.Y. ("Dylan"). *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of the child). The trial court erred in exercising jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement

Act ("UCCJEA") and its order is vacated. This cause is remanded for dismissal of the petition.

I. Factual Background

Petitioner and Respondent were married briefly and separated prior to Dylan's birth in Las Vegas, Nevada. Petitioner is Dylan's father and is a resident of Stanly County, North Carolina. Respondent is Dylan's mother and lives in Ventura County, California.

Petitioner filed a petition and a subsequent amended petition to terminate Respondent's parental rights in the Stanly County District Court on 29 March 2018 and 18 May 2018, respectively. Petitioner alleged Dylan resided with him in Stanly County, such that "North Carolina is the home state of the child," pursuant to "a juvenile court order from the State of California entered as a result of a juvenile protective services investigation filed October 18, 2013 which gave custody to petitioner with supervised once per year visits granted to respondent." Petitioner further alleged "California terminated [its] jurisdiction by the terms of said order." The petition alleged Respondent is "a citizen and residence [sic] of Ventura County, California," but claimed she had temporarily "moved to Nevada in or about 2016 thereby terminating California's jurisdiction."

Respondent filed a written answer admitting the petition's allegations regarding the respective locations of the parties and the actions of the court in California in the 2013 custody proceeding. Respondent denied many of the substantive allegations in the petition and accused Petitioner of "withholding [Dylan] from the Respondent" and not allowing her to communicate with her son.

After a hearing on 9 August 2018, the trial court found grounds existed to terminate Respondent's parental rights based upon her neglect and willful abandonment of Dylan. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (7) (2017). The court further concluded Dylan's best interest required terminating Respondent's parental rights. *See* N.C. Gen. Stat. § 7B-1110(a) (2017). Respondent filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of the district court entered 4 September 2018 pursuant to N.C. Gen. Stat. § 7B-1001(a) (2017).

III. Issue

Respondent argues the trial court lacked subject matter jurisdiction to hear and enter orders under the UCCJEA because: (1) a court

in California entered an initial child-custody determination with regard to Dylan, *see* N.C. Gen. Stat. §§ 50A-102(3)-(8), 50A-201 (2017); (2) the court in California did not determine it no longer had jurisdiction or that North Carolina would be a more convenient forum, *see* N.C. Gen. Stat. § 50A-203(1) (2017); and (3) Respondent had resided in California from the time Petitioner filed the petition to terminate her parental rights through the date of the termination hearing, *see* N.C. Gen. Stat. § 50A-203(2) (2017).

IV. Standard of Review

"The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent. Consequently, a court's lack of subject matter jurisdiction is not waivable and can be raised at any time." *In re K.J.L.*, 363 N.C. 343, 345-46, 677 S.E.2d 835, 837 (2009) (citations and internal quotation marks omitted). "The question of whether a trial court has subject matter jurisdiction is a question of law and is reviewed *de novo* on appeal." *In re B.L.H.*, 239 N.C. App. 52, 58, 767 S.E.2d 905, 909 (2015).

V. Analysis

A. Subject Matter Jurisdiction

"Jurisdiction over termination of parental rights proceedings is governed by N.C. Gen. Stat. § 7B-1101." *In re. J.M.*, 249 N.C. App. 617, 619, 797 S.E.2d 305, 306 (2016). Compliance with the UCCJEA, as codified in Chapter 50A of our General Statutes, is essential to the juvenile court's subject matter jurisdiction under N.C. Gen. Stat. § 7B-1101.

> [B]efore exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, without regard to G.S. 50A-204 . . . .

N.C. Gen. Stat. § 7B-1101 (2017); *see also In re J.D.*, 234 N.C. App. 342, 345, 759 S.E.2d 375, 378 (2014) ("pursuant to N.C. Gen. Stat. § 7B-1101 and the UCCJEA, we must determine whether the trial court possessed subject matter jurisdiction under N.C. Gen. Stat. §§ 50A-201 or -203").

The trial court made findings of fact in support of its assertion and conclusion of jurisdiction:

> 1. That this Court has . . . subject matter jurisdiction . . . . There is an existing custody order in favor of the petitioner, however, California relinquished continuing, exclusive jurisdiction when that State terminated their jurisdiction, and when both parties and the minor child subsequently moved from the State of California.
>
> . . . .
>
> 3. The petitioner . . . is a citizen and resident of Stanly County, North Carolina, and has been for more than six (6) months next preceding the institution of this action. Further, the minor child herein has also been a citizen and resident of the State of North Carolina, County of Stanly, for more than six (6) months next proceeding the commencement of this action.
>
> 4. The respondent is . . . a citizen and resident of the State of California.

The court separately concluded that it "has . . . subject matter jurisdiction over the . . . subject matter herein."

Respondent objects to the trial court's finding that "California relinquished continuing, exclusive jurisdiction when that State terminated [its] jurisdiction, and when both parties and the minor child subsequently moved from the State of California." To the extent the trial court's findings of fact refer to the legal effect of actions taken by the parties or the court in California, they are reviewed *de novo* as conclusions of law. *See In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004), *disc. review denied*, 359 N.C. 321, 611, S.E.2d 413 (2005). Respondent specifically challenges the trial court's assessment that the court in California had "terminated [its] jurisdiction" in the custody proceeding or that North Carolina had otherwise obtained subject matter jurisdiction under the UCCJEA.

It is undisputed that a juvenile court in Los Angeles, California, entered a "Custody Order—Juvenile—Final Judgment" on 18 October 2013 awarding legal and physical custody of Dylan to Petitioner in case number CK98455, with visitation awarded to Respondent. This order constitutes a prior child-custody determination under the UCCJEA. *See* N.C. Gen. Stat. 50A-102(3) (2017). " 'Accordingly, any change to that [California] order qualifies as a modification under the UCCJEA.' " *In re*

N.B., 240 N.C. App. 353, 357, 771 S.E.2d 562, 565 (2015) (quoting *In re N.R.M.*, 165 N.C. App. 294, 299, 598 S.E.2d 147, 150 (2004)).

Modification of another state's child-custody determination is governed by N.C. Gen. Stat. § 50A-203 (2017), which provides in pertinent part:

> a *court of this State may not modify* a child-custody determination made by a court of another state unless a court of this State has *jurisdiction to make an initial determination* under G.S. 50A-201(a)(1) or G.S. 50A-201(a)(2) *and*:
>
> (1) The court of the other state determines it *no longer has exclusive, continuing jurisdiction* under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; *or*
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent *do not presently reside in the other state.*

N.C. Gen. Stat. § 50A-203(1)-(2) (emphasis supplied).

We agree with Petitioner the district court in North Carolina could have asserted "jurisdiction to make an initial [custody] determination" under N.C. Gen. Stat. § 50A-201(a) based upon Petitioner and Dylan having resided in Stanly County since 2016. N.C. Gen. Stat. § 50A-203. However, neither of the alternative bases exist for the court in North Carolina to assert jurisdiction to modify or terminate the California court's 2013 initial custody determination under N.C. Gen. Stat. § 50A-203(1) or N.C. Gen. Stat. § 50-203(2).

With regard to N.C. Gen. Stat. § 50A-203(1), "[t]he court of the other state," i.e., California, did not "determine[] it no longer has exclusive, continuing jurisdiction" or that "a court of this State would be a more convenient forum." The California court's 18 October 2013 custody order provides as follows:

> 9. As of the date below, the juvenile court
>
> a. has terminated jurisdiction over [Dylan]; requests for any modifications of these orders must be brought in the family court case in which these orders are filed under Welfare and Institutions Code section 302(d) or 726.5(c).

. . . .

13. The clerk of the juvenile court . . . must transmit this order within 10 calendar days to the clerk of the court of any county in which a custody proceeding involving the child is pending or, if no such case exists, to the clerk of the court of the county in which the parent given custody resides. The clerk of the receiving court must, immediately upon receipt of this order, file the order in the pending case or, if no such case exists, open a file without a filing fee and assign a case number.

14. The clerk of the receiving court must send by first-class mail an endorsed filed copy of this order, showing the case number of the receiving court to:

    . . . .

    b. Father (*name and address*): Desa Lagorio . . . Northridge, CA 91234 [order erroneously records Respondent's name and address as that of Petitioner's, then a resident of South Carolina]

Although the California *juvenile* court terminated its own jurisdiction, it did so for the purpose of transferring custody jurisdiction to the California *family* court. *See* Cal. Welf. & Inst. Code § 726.5(d) (2016); *cf. also* N.C. Gen. Stat. § 7B-911(a)-(b) (2017) (authorizing juvenile court, upon awarding custody to a parent, to terminate its own jurisdiction and direct the clerk of court to enter a civil custody order under Chapter 50 of the North Carolina General Statutes). The trial court in Stanly County properly noted the nature of the California court's directive at the outset of the termination hearing:

> THE COURT: . . . Looking at a custody Order out of the state of California. By the terms of that custody Order it appears entered October 18th, 2013. It says as of the date below which is the same date October 18th, that the juvenile Court has terminated jurisdiction over the . . . child[] we're concerned here with. Uhm, does that, *certainly it appears that it terminates jurisdiction in the juvenile Court but I'm not so sure whether that terminates California's jurisdiction as such.*

(Emphasis supplied).

The trial court proceeded with the hearing based on the parties' agreement that North Carolina was Dylan's home state and Respondent's waiver of objection "as far as submitting to the personal jurisdiction of the Court."

Because the UCCJEA governs the court's *subject matter* jurisdiction, we conclude the court entering the order under review did not possess subject matter jurisdiction under N.C. Gen. Stat. § 50A-203(1) based upon Respondent's waiver. Moreover, the record before this Court contains no determination by a court in California that "it no longer has exclusive, continuing jurisdiction" as is required by N.C. Gen Stat. § 50-203(1).

With regard to N.C. Gen. Stat. § 50A-203(2), neither the court in California nor the court at the hearing made a finding that Respondent "do[es] not presently reside in [California]." N.C. Gen. Stat. § 50A-203(2). Petitioner alleged, Respondent admitted, and the trial court found that Respondent "is a citizen and resident of the State of California."

Respondent was served with the petition and summons by certified mail at her home address in Simi Valley, California. Petitioner concedes Respondent was residing in California at the time he had initiated the termination proceeding in March 2018. The trial court acquired no jurisdiction to modify the California court's child-custody determination under N.C. Gen. Stat. § 50A-203(2) when that court had not terminated jurisdiction.

B. Relocation to Another State

Petitioner contends Respondent's act of moving to Nevada for two years had the effect of ending the California court's "exclusive, continuing jurisdiction" over Dylan's custody, notwithstanding the undisputed fact that Respondent had returned to and was a resident of California prior to the filing and service of the petition to terminate her parental rights. Petitioner points to the Official Commentary for N.C. Gen. Stat. § 50-202, which states as follows:

> Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. . . . [U]nless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.

. . . .

> Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns.

N.C. Gen. Stat. § 50A-202, Official Comment (2017); *see also* Cal. Fam. Code § 3422(a) (2017).

Presuming *arguendo* the court in California lost exclusive, continuing jurisdiction when Respondent temporarily relocated from California to Nevada, this occurrence did not confer jurisdiction upon the district court in North Carolina to modify the initial custody determination which was entered in California. Subsection 50A-203(1) requires a finding by the court in California that it no longer has continuing, exclusive jurisdiction, a finding that is not in evidence in the record or in the order appealed from.

C. Parental Kidnapping Prevention Act

Petitioner also asserts California's court lost continuing jurisdiction under the provisions of the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A(d) (2019), and notes the PKPA controls over state custody law, where the two statutes are in conflict. *In re Bean*, 132 N.C. App. 363, 366, 511 S.E.2d 683, 686 (1999). Because we presume the court in California lost continuing, exclusive jurisdiction under the UCCJEA when Respondent temporarily moved out of the state, we observe no conflict between the relevant state law and the PKPA on this issue.

Alternatively, N.C. Gen. Stat. § 50A-203(2) requires a finding by either the court in California or in North Carolina that Respondent does not "presently reside[]" in California, which is directly contrary to the parties' stipulations, the evidence and the trial court's finding. *Cf. In re T.J.D.W.*, 182 N.C. App. 394, 397, 642 S.E.2d 471, 473 (finding jurisdictional requirement in N.C. Gen. Stat. § 50A-203(2) satisfied by evidence that "both parents had left South Carolina at the time of the commencement of the [North Carolina termination] proceeding"), *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007).

VI. Conclusion

The trial court lacked subject matter jurisdiction under either N.C. Gen. Stat. § 7B-203(1) or (2) to modify the California court's child-custody determination. " 'When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as

if it had never happened.' " *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (quoting *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970)).

The order terminating Respondent's parental rights is vacated. *See id.* at 135, 702 S.E.2d at 108. This cause is remanded for dismissal of the petition for lack of subject matter jurisdiction. *It is so ordered.*

VACATED.

Judges DILLON and BERGER concur.

IN RE T.H. & M.H.

No. COA18-926

Filed 18 June 2019

1. Termination of Parental Rights—best interests of child—statutory factors

The trial court did not abuse its discretion by concluding that termination of a mother's parental rights was in the best interests of her children after it considered and weighed the factors contained in N.C.G.S. § 7B-1110(a), including the mother's attempts to maintain sobriety and the bond between the children and their parents and other family members. The Court of Appeals rejected the mother's argument that the trial court was required to make findings regarding reunification pursuant to section 7B-906.2(b), particularly where reunification was not the primary permanent plan at the time of the termination hearing.

2. Termination of Parental Rights—no-merit brief—neglect

No prejudicial error occurred in a proceeding to terminate a father's parental rights to his children on the ground of neglect, where the trial court's conclusions were supported by sufficient findings, which were in turn supported by clear, cogent, and convincing evidence.

Appeal by Respondents from order entered 1 June 2018 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 30 May 2019.

Jane R. Thompson for Petitioner-Appellee Rowan County Department of Social Services.

Cranfill Sumner & Hartzog LLP, by Katherine Barber-Jones, for guardian ad litem.

Dorothy Hairston Mitchell for Respondent-Appellant Mother.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for Respondent-Appellant Father.

DILLON, Judge.

Respondents, Mother and Father of the minor children T.H. ("Tonya") and M.H. ("Madeline"),[1] appeal from the trial court's order terminating their parental rights to the children. We hold the trial court did not abuse its discretion in determining that termination of Mother's parental rights was in the children's best interests, and we hold it properly concluded grounds existed to terminate Father's parental rights based on neglect. We, therefore, affirm the trial court's order.

I. Background

Respondents' history with the Rowan County Department of Social Services ("DSS") dates back to 2011 due to substance abuse and mental health issues and their lack of proper care and supervision of the children. In November 2011, Mother tested positive for methadone and amphetamines at Tonya's birth, and Tonya had to remain in the hospital for weeks due to significant withdrawal symptoms. From 2011 to 2016, DSS received multiple reports regarding the family due to drug abuse and supervision issues.

DSS most recently became involved with the family in early 2016 after receiving reports relating to Respondents' substance abuse and inappropriate living conditions. On 12 February 2016, DSS filed a juvenile petition alleging both juveniles to be neglected and dependent and took the children into non-secure custody.

A week later, Respondents entered into an Out of Home Family Services Agreement (OHFSA) in which they agreed to obtain and

1. Pseudonyms are used to protect the juveniles' identities, *see* N.C. R. App. P. 42, and for ease of reading.

maintain appropriate housing, obtain and maintain employment, complete substance abuse and mental health treatment, complete a psychiatric evaluation, submit to random drug screens, complete a parenting education course, resolve all pending legal issues, and refrain from criminal activity.

Five weeks later, on 31 March 2016, the trial court entered a consent order, adjudicating the children neglected and dependent. The trial court found that Respondents had multiple pending criminal charges and continued to suffer from long-term, untreated substance abuse and mental health issues. The court also found that the children were living in an unsafe environment and were not receiving proper medical or dental care. The court ordered Respondents to comply with the components of their case plan. Over the next several months, however, both Mother and Father were in and out of jail.

On 2 June 2016, Mother completed her substance abuse assessment and was recommended to complete forty (40) hours of structured group therapy and to see a psychiatrist. Mother attended one group session in December 2016 but did not attend another session. On 23 January 2017, Mother was arrested for obtaining a controlled substance by fraud or forgery after attempting to fill her recently deceased mother's prescription for Alprazolam.

In June 2017, the trial court entered a permanency planning review order, changing the primary permanent plan to adoption with a secondary plan of reunification. The trial court found that Respondents had not made any progress on their case plans, finding that Respondents had not participated in any treatment recommendations, including any substance abuse or mental health services, that they had not engaged in any parenting education services, and that "[n]either parent understands the severity of their [criminal] charges or the effect their criminal behavior and incarcerations have on their children."

A month later, in July 2017, DSS filed a petition to terminate Respondents' parental rights based on the grounds of neglect, willfully leaving the children in foster care without making reasonable progress to correct the conditions which led to the children's removal, and willfully failing to pay a reasonable portion of the children's cost of care. *See* N.C. Gen. Stat. § 7B-1111(a)(1)-(3) (2017).

Eleven months later, in June 2018, following two hearings on the matter, the trial court entered an order concluding that grounds existed to terminate Respondents' parental rights based on neglect and willfully leaving the children in foster care without making reasonable progress,

and that termination of Respondents' parental rights was in the children's best interests.

Accordingly, the trial court terminated Respondents' parental rights to Tonya and Madeline. Respondents each filed timely written notice of appeal.

II. Analysis

Mother and Father appeal, each bringing separate issues corresponding to termination of their individual parental rights. We address each respondent in turn.

A. Mother's Appeal

[1] Mother does not challenge the trial court's adjudication that grounds existed to terminate her parental rights. Rather, Mother's sole issue on appeal is that the trial court abused its discretion in determining that termination of her parental rights was in the children's best interests.

After a trial court adjudicates the existence of at least one ground for termination, the court must then determine at disposition whether termination is in the best interests of the child. N.C. Gen. Stat. § 7B-1110(a) (2017). The court must consider the factors listed in Chapter 7B-1110(a).

"The court's determination of the juvenile's best interest will not be disturbed absent a showing of an abuse of discretion." *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630 (2010) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Mother first argues the trial court failed to make the written findings required by Chapter 7B-906.2(b) of our General Statutes, which applies to "permanency planning hearing[s]," in order to cease reunification efforts. Specifically, Mother appears to view the requirements of Section 7B-906.2(b) as part of the court's inquiry under Section 7B-1110(a)(3) in a termination determination. Mother argues that reunification remained the primary permanent plan at the time of the termination hearing, and thus the court was required to make the necessary findings under Chapter 7B-906.2(b) in order to cease reunification efforts. We disagree.

First, contrary to Mother's assertion, reunification was not the primary permanent plan at the time of the termination hearing. In a 30 June 2017 permanency planning order, the trial court changed the permanent plan to a primary plan of adoption with a secondary plan

of reunification. Second, a hearing on a petition to terminate parental rights is not a permanency planning hearing. Section 7B-906.2 pertains to permanent plans that must be established at permanency planning hearings, while Chapter 7B, Article 11, the statute at issue here, provides for the judicial procedures for terminating parental rights. *See* N.C. Gen. Stat. § 7B-1100(1) (2017).

Mother relies on this Court's recent decision in *In re D.A.* to support her argument. However, *In re D.A.* was not an appeal from a termination order, but from a permanency planning order granting custody of the child to the foster parents and waiving further review hearings. *In re D.A.*, ___ N.C. App. ___, 811 S.E.2d 729 (2018). Mother has not cited any authority requiring the trial court to make the findings set forth in Section 7B-906.2(b) at a hearing for the termination of parental rights.

Here, the trial court found that terminating Respondents' parental rights "[was] necessary to accomplish the best permanent plan for the juveniles, which is adoption." Mother does not challenge this finding, and it is therefore binding on appeal. *In re D.L.H.*, 364 N.C. 214, 218, 694 S.E.2d 753, 755 (2010). Therefore, the trial court made the appropriate finding addressing Section 7B-1110(a)(3), and Mother's first argument is overruled.

Mother next argues the trial court failed to consider three "other relevant considerations" under Section 7B-1110(a)(6) in determining termination was in the children's best interest. Mother contends the trial court failed to consider (1) her substantial progress toward her sobriety, (2) the bond the children shared with her and other maternal family members, and (3) DSS's failure to make reasonable efforts toward reunification. We disagree and address each in turn.

Mother first asserts the trial court failed to consider the progress she made toward her sobriety and self-sufficiency. The trial court's findings indicate that it did consider Mother's claim regarding her progress toward her sobriety, finding that mother "report[ed] that she [had] been sober for one year" and "that she tested negative on a drug screen administered by her probation officer yesterday." However, there was evidence that Mother was incarcerated for all but a few days of that year of her claimed sobriety. It is the trial "judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984). Thus, it was within the trial court's discretion to determine that Mother's years of unaddressed substance abuse issues outweighed her claim of recent progress.

Next, Mother argues the trial court failed to consider the children's bond with both her and the children's biological relatives. Contrary to Mother's assertion, the trial court *did* consider this bond and found that there was not a strong bond. Specifically, the trial court found that

> There is not a strong bond between the children and their parents. [Tonya] does not have memories of being with [Mother] and [Father] other than sitting in front of a TV. [Tonya] was worried with adoption in the beginning as she thought if she loved [her foster parents, Mr. and Mrs. C,] then she would be betraying her parents. She does not want to be removed from Mr. and Mrs. [C's] home. [Madeline] loves her parents. She worries about them and remembers some of the things she was exposed to while in the care of her parents. [Madeline] does not feel like she is important to [Mother] and [Father]. [Madeline] has referred to her parents [by their first names]. [Tonya] and [Madeline] have not asked [Mr. and Mrs. C] to have contact with [Mother] and [Father].

Mother does not challenge this finding, and therefore it is binding on appeal. *In re D.L.H.*, 364 N.C. at 218, 694 S.E.2d at 755.

Mother also contends the court failed to consider the bond the children have with their biological relatives, namely their maternal aunt and uncle and maternal grandfather, and argues that terminating her parental rights threatens to destroy the bonds the children have with the maternal family members. However, the trial court did make findings in this regard, for instance, specifically finding that the children visit with their maternal grandfather and their maternal aunt and uncle. Therefore, we find no merit to Mother's contention.

Lastly, Mother argues the trial court failed to consider DSS's failure to make efforts toward reunification. She argues DSS only contacted her once a month while she was incarcerated and made no efforts to achieve reunification. She contends that, once she was incarcerated, DSS gave up on its reunification efforts, and that the court's failure to consider this factor was an abuse of discretion.

However, "[t]he trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered" when determining its disposition under Section 7B-1110. *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005). While the trial court must consider all of the factors in Section 7B-1110(a), it only is required to make written findings regarding those factors that are relevant. *In re D.H.*, 232

N.C. App. 217, 221, 753 S.E.2d 732, 735 (2014). A factor is relevant if there is conflicting evidence concerning the factor such that it is placed in issue. *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015).

There was no conflicting evidence concerning DSS's efforts in contacting Mother during her incarceration. The only evidence regarding DSS's reunification efforts comes from a social worker's "previously-provided sworn testimony" during the adjudication phase which was incorporated without objection during the disposition phase. Because this factor was not "placed in issue[,]" no findings regarding DSS's efforts toward reunification were required. *Id.* Mother has not provided any indication that the trial court failed to consider this information in making its determination.

Additionally, to the extent Mother attempts to excuse her failure to make reasonable progress by claiming DSS failed to make efforts toward reunification, Mother did not challenge the trial court's adjudication that she willfully failed to make reasonable progress under Section 7B-1111(a)(2). By arguing that the trial court "failed to appreciate" DSS's alleged failure to make reunification efforts, Mother essentially contends this evidence was not given sufficient weight by the trial court. However, "[i]t is not the function of this Court to reweigh the evidence on appeal." *Garrett v. Burris*, 224 N.C. App. 32, 38, 735 S.E.2d 414, 418 (2012), *aff'd per curiam*, 366 N.C. 551, 742 S.E.2d 803 (2013).

In sum, we see no indication that the trial court failed to consider any "relevant consideration" under the catch-all provision of Section 7B-1110(a)(6). A court is entitled to give greater weight to certain factors over others in making its determination concerning the best interest of a child. *In re C.L.C.*, 171 N.C. App. 438, 448, 615 S.E.2d 704, 709-10 (2005) (explaining that, though mother emphasized her bond with the child, "[t]he trial court was, however, entitled to give greater weight to other facts that it found"), *aff'd per curiam in part, disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006) (affirming the majority opinion). The trial court's order reflects that it properly considered the required factors and made a reasoned determination that termination was in the children's best interests. Accordingly, we hold the trial court did not abuse its discretion in determining that termination of Mother's parental rights was in the best interests of the children, and we affirm the order terminating her parental rights.

B. Father's Appeal

[2] Father's counsel has filed a "no-merit" brief on his behalf in which they state that, after a conscientious and thorough review of the record

on appeal and transcripts, they were unable to identify any issue of merit on which to base an argument for relief. Pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure, they request that this Court conduct an independent examination of the case. N.C. R. App. P. 3.1(e).

In accordance with Appellate Rule 3.1(e), appellate counsel wrote Father a letter advising him of (1) counsel's inability to find error; (2) counsel's request for this Court to conduct an independent review of the record; and (3) Father's right to file his own arguments directly with this Court while the appeal is pending. Counsel attached to the letter a copy of the record, transcript, and no-merit brief. Father, however, has not submitted written arguments of his own to this Court.

As such, we are not required to conduct a review as neither Father nor his counsel has brought forth any issue for our consideration. *In re L.V.*, ___ N.C. App. ___, ___, 814 S.E.2d 928, 928-29 (2018). That is, the no-merit brief provision in Rule 3.1(e) promulgated by our Supreme Court, which does not contain any such requirement, should not be conflated with the requirements set forth by the United States Supreme Court where no-merit briefs are filed in a criminal appeal. *In re L.V.* is based on the following reasoning, as found in the concurring opinion in *State v. Velasquez-Cardenas*, ___ N.C. ___, 815 S.E.2d 9 (2018).

Our State Constitution provides that our "Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const. Art. IV, sec. 13(2). Pursuant to its exclusive authority, our Supreme Court has promulgated Rule 28(a), which limits *the right* of an appellant to a review by our Court to those issues raised in its brief, though *in our discretion* we can waive Rule 28(a) by invoking Rule 2 of our Rules of Appellate Procedure in order to review *other* issues not raised in the briefs. N.C. R. App. P. 2; N.C. R. App. P. 28(a).

Rule 28(a)'s limited right to review, however, is qualified somewhat by the United States Supreme Court decision in *Anders v. California*, in which that Court determined that a criminal defendant has the right to a review by an appellate court of issues *not* raised in his brief *in certain circumstances*. *Anders v. California*, 386 U.S. 738, 744 (1967). *Anders*, however, only applies to the *first* appeal of right in criminal cases, not to parental rights appeals. Specifically, in *Anders*, that Court held that indigent criminal defendants are entitled under our federal constitution to certain procedures during a first appeal of right, where appointed counsel fails to discern a non-frivolous appellate issue. *Id*. These procedures

include (1) the defendant's right to file a brief when his attorney has filed a "no merit" brief and (2) the defendant's right to a full search of the record by the appellate court, even if no meritorious issues were raised by the defendant or his attorney.

In a later case, the U.S. Supreme Court held that, under our federal constitution, an indigent defendant is *not* entitled to *Anders* procedures on *subsequent* post-conviction appeals even where state law provides such defendants a right to counsel for that appeal. *See Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987).

This present matter is not criminal in nature; therefore *Anders* does not apply. Our General Assembly, however, has provided parents the right to an appeal where their parental rights are terminated and a right to counsel for that appeal. Our General Assembly, though, has not provided these parties the right to all *Anders* procedures, such as the right to a full *Anders* review of issues not raised in the briefs. Neither our State Constitution nor the federal constitution provides this right. And our Supreme Court has not provided for such a right by appellate rule or otherwise. Rather, our Supreme Court has restricted the right of review in all appeals to those raised in the briefs. N.C. R. App. 28(a).

The Supreme Court had the opportunity to create a right to an *Anders*-type review in parental rights cases, but that Court has not done so. Specifically, in 2007, we held that an indigent parent with a statutory right to counsel had no right to *Anders* procedures; but we urged "our Supreme Court or the General Assembly to reconsider this issue." *In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007). The General Assembly has not responded. Our Supreme Court did respond by promulgating Rule 3.1(e), creating a right to *some Anders*-type procedures in the termination of parental rights context. Specifically, where a party typically has no right to file a separate brief when represented by counsel, our Supreme Court created a right for an indigent parent to raise issues in a separate brief where that parent's counsel has filed a "no-merit" brief. N.C. R. App. 3.1(e). However, our Supreme Court, in Rule 3.1(e), has *not* created any right for that parent to receive an *Anders*-type review of the record by our Court for consideration of issues not explicitly raised by the parent or that parent's counsel.

Therefore, until our Supreme Court, by rule or holding, or our General Assembly, by law, creates a right to an *Anders*-type review of issues not raised by the parties or their counsel, we must follow our Supreme Court's Rule 28(a), which limits *the right* of appellants to a review of issues actually raised in the briefs.

This is not to say that we cannot exercise our discretion, pursuant to Rule 2, to consider issues not properly raised in the briefs, which we do here.

In our discretion, we have reviewed the transcript and record. Based on our review, we are unable to find any prejudicial error in the trial court's order terminating Father's parental rights. The termination order contains sufficient findings of fact supported by clear, cogent, and convincing evidence to support the conclusion that grounds exist to terminate Father's parental rights based on neglect. The trial court's findings demonstrate that the children were previously adjudicated neglected, and that Father did not take any steps to correct the conditions that led to the children being removed from his care, but instead absconded from his probation with Mother. *See In re M.J.S.M.*, ___ N.C. App. ___, ___, 810 S.E.2d 370, 373 (2018) ("A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect."). The trial court also made appropriate findings in determining that the termination of Father's parental rights was in the children's best interests. *See* N.C. Gen. Stat. § 7B-1110(a).

AFFIRMED.

Judges TYSON and BERGER concur.

WENDY JOHNSON, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA18-822

Filed 18 June 2019

1. Civil Rights—contested case—sex discrimination—hiring decision—burden-shifting framework for mixed motive cases—applicable

In a contested case alleging sex discrimination where a female employee of a state agency applied for an internal position that eventually went to a highly qualified male candidate, the administrative law judge erred in applying the burden-shifting framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), rather than the framework from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), for "mixed-motive" cases. The female employee presented

direct evidence that sex was a motivating factor in the agency's hiring decision, where the hiring manager submitted a "request for candidate pre-approval" to the agency stating that the male candidate would add diversity to an all-female staff.

2. Appeal and Error—mootness—contested case—state agency's hiring decision—alleged failure to apply veteran's preference

In an appeal from a contested case where a state agency employee was not hired for an internal position that she applied for, the issue of whether the state agency improperly applied a veteran's preference (pursuant to N.C.G.S. § 126-80) was dismissed as moot. The employee conceded that, even if the agency improperly applied the veteran's preference, that failure was harmless because she still got to interview for the job and competed against applicants with substantially equal qualifications.

Appeal by Petitioner from Final Decision and Amended Final Decision entered 21 May 2018 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 30 January 2019.

Pope McMillan, P.A., by Clark D. Tew, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for respondent-appellee.

MURPHY, Judge.

This case requires us to consider whether the Administrative Law Judge ("ALJ") erred in applying the *McDonnell Douglas* burden-shifting framework, rather than the *Price Waterhouse* mixed-motive burden-shifting framework, in determining a claim of alleged discrimination on the basis of sex. We conclude the ALJ applied the incorrect burden-shifting framework. While we reverse and remand for further proceedings, we dismiss as moot Appellant's argument that the ALJ erred in concluding that NCDPS improperly denied her veteran's preference.

BACKGROUND

On 7 February 2017, the North Carolina Department of Public Safety ("NCDPS") internally announced that it was accepting applications for a vacant Personnel Technician III position at the Western Foothills Regional Employment Office ("WFREO"). The posting described the position as the salary administration specialist and assistant manager of

WFREO. It stated that applicants must possess "[d]emonstrated knowledge and experience with using BEACON/SAP to include report generation" and "with salary administration in NC state government" and "[c]onsiderable knowledge of state personnel policies and procedures related to recruitment, employment and salary administration." At the time of the job posting, the entire staff of WFREO was female.

Appellant, Wendy Johnson ("Johnson"), was a female employed by NCDPS as an Administrative Services Assistant V at Wilkes Correctional Center when she applied for the position at WFREO. Johnson had a high school education and 150 months of experience in State government positions. Several other NCDPS employees applied for the position, and an independent "screener" narrowed the applicant pool to seven individuals to be interviewed based on selective criteria, including the candidates' education and experience and related knowledge, skills, abilities, and competencies. The interview pool consisted of two male and five female candidates, Johnson included.

Lou Ann Avery ("Avery"), the manager of WFREO and the hiring manager for the vacant position, interviewed the seven candidates with Larry Williamson ("Williamson"), the Superintendent at Foothills Correctional Institution. At the interview, "each candidate was asked a series of 'benchmarked' questions. Three of the nine questions were not truly 'benchmarked', but were accompanied by vague and generalized instructions for scoring responses that left substantial room for subjective interpretation by the interviewer in scoring those questions." Johnson received an overall interview score of "average." Of the candidates interviewed, only one candidate, a male, scored "above average."

Avery decided to offer the male ("John Doe") the position and submitted her "Request for Candidate Pre-Approval" to NCDPS. The Request stated the following under "justification":

> WFREO is recommending [John Doe] for the position of Personnel Tech III. Mr. [Doe] has a Bachelor's degree and 104 months experience above minimum in Human Resources, NCDPS and private sector. Mr. [Doe] brings experience in Beacon, Benefits, NeoGov, BobJ reports and supervisory. On February 22, 2017 we interviewed a total of 7 applicants. Three applicants scored Average, three scored Below Average, Mr. [Doe] was the only Above Average score. *Promoting Mr. [Doe] to the WFREO will also add diversity to an all female staff.* I am recommending $42,159 salary for Mr. [Doe], a 10% increase from his current salary.

(emphasis added). Lisa Murray ("Murray") at NCDPS approved Avery's Request without making any alterations to the justification.

After Johnson was informed that she was not selected for the position, she spoke with Natalie Crookston ("Crookston"), another applicant for the position who was not selected. Crookston stated she had spoken with Avery, who "implied in the conversation" that Doe was selected for the position because he was a male. Johnson subsequently filed a *Petition for a Contested Case Hearing* in the Office of Administrative Hearings ("OAH"), alleging discrimination based on sex and failure to receive priority consideration for veteran's preference. The matter was heard before an ALJ in Catawba County, who concluded, "Petitioner failed to carry her burden to demonstrate by a preponderance of the evidence that the Respondent's hiring decision was discriminatory." The ALJ also concluded "Petitioner failed to meet her burden of proof that Respondent failed to properly apply the Veterans' Preference in violation of [N.C.G.S.] § 126-82." Johnson appeals.

ANALYSIS

A. Discrimination on the Basis of Sex

[1] Johnson argues the ALJ erred in applying the *McDonnell Douglas* burden-shifting framework rather than the *Price Waterhouse* framework. We agree.

1. Standard of Review

N.C.G.S. § 150B-51(b) provides the applicable standards of review in appeals of final decisions by an administrative tribunal:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b) (2017).

"Where the asserted error falls under subsections 150B-51(b)(5) and (6), we apply the whole record standard of review." *Whitehurst v. East Carolina Univ.*, ___ N.C. App. ___, ___, 811 S.E.2d 626, 631 (2018). Under this standard, we "examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decisions. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations and internal quotation marks omitted).

"We conduct a *de novo* review of an asserted error of law falling under subsections 150B-51(b)(1)-(4) . . . ." *Id.* at ___, 811 S.E.2d at 631. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the ALJ." *Id.* (citation and internal quotations marks omitted).

2. Legal Frameworks

Under N.C.G.S. § 126-34.02, "[a]n applicant for State employment, a State employee, or former State employee may allege discrimination or harassment based on . . . sex . . . if the employee believes that he or she has been discriminated against in his or her application for employment . . . ." N.C.G.S. § 126-34.02(b)(1) (2017). "[W]e look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *N.C. Dep't. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).

There are multiple avenues by which a petitioner may establish a causal connection between an adverse employment action and a discriminatory motive on the basis of sex. *Newberne v. Dep't of Crime Control and Public Safety*, 359 N.C. 782, 790, 618 S.E.2d 201, 207 (2005). A petitioner may rely on direct evidence of a single discriminatory motive, such as an "employer's admission that it took adverse action against the plaintiff solely because of the" plaintiff's sex or protected characteristic. *Id.* (citation, alterations, and internal quotation marks omitted). Recognizing that such evidence is rare, the U.S. Supreme Court created a second avenue by which a plaintiff may establish a claim of sex discrimination based on circumstantial evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 677-78 (1973); *Newberne*, 359 N.C. at 790, 618 S.E.2d at 207. The *McDonnell Douglas* framework created a burden-shifting scheme:

> Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a prima facie case of unlawful [discrimination], the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. The ultimate burden of persuasion rests at all times with the plaintiff.

Newberne, 359 N.C. at 791, 618 S.E.2d at 207-08 (citations omitted).

A successful claim under the *McDonnell Douglas* framework assumes a single discriminatory motive and that any preferred legitimate motive is pretextual. Yet, there are situations where an employment decision is the result of both legitimate and discriminatory motives. This third avenue of proof is widely referred to as a "mixed-motive" case, first recognized by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268 (1989). The plurality opinion created a new burden-shifting framework for mixed-motive cases where, "once a plaintiff . . . shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." *Id.* at 244-45, 104 L. Ed. 2d at 284. Justice O'Connor concurred, stating, "In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Id.* at 276, 104 L. Ed. 2d. at 304 (O'Connor, J., concurring).

Congress subsequently codified and, on multiple occasions, modified the mixed-motive framework. Under the Civil Rights Act of 1991:

> a plaintiff succeeds on a mixed-motive claim if she demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice. Once such a showing has been made, the employer cannot escape liability. However, through use of a limited affirmative defense, if an employer can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor, it can restrict a plaintiff's damages to injunctive and declaratory relief, and attorney's fees and costs.

Diamond v. Colonial Life Acc. Ins. Co., 416 F.3d 310, 317 (4th Cir. 2005) (citations and internal quotation marks omitted). Yet, courts were still divided as to whether direct evidence of discrimination was required for a plaintiff to pursue a mixed-motive theory, with many relying on Justice O'Connor's concurrence in *Price Waterhouse*. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95, 156 L. Ed. 2d. 84, 91 (2003). In *Desert Palace*, based on a plain reading of 42 U.S.C. § 2000e-2(m), the U.S. Supreme Court held that "direct evidence of discrimination is not required in mixed-motive cases[.]" *Desert Palace*, 539 U.S. at 101-02, 156 L. Ed. 2d at 96.

It is elementary that, while "we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases[,]" those decisions are not binding authority. *See N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). Our courts have not directly addressed the evidentiary showing required for a plaintiff alleging discrimination on the basis of sex to succeed on a mixed-motive theory. However, our Supreme Court addressed the proper mixed-motive framework for an unlawful retaliation claim under the Whistleblower Act in *Newberne*. The Court engaged in a similar analysis of the various avenues a plaintiff may use to establish a causal connection between protected activity and adverse employment action:

> Therefore, claims brought under the Whistleblower Act should be adjudicated according to the following procedures. First, the plaintiff must endeavor to establish a prima facie case of retaliation under the statute. The plaintiff should include any available direct evidence that the adverse employment action was retaliatory along with circumstantial evidence to that effect. Second, the defendant should present its case, including its evidence as to legitimate reasons for the employment decision. Third, once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has demonstrated that he or she engaged in a protected activity and the defendant took adverse action against the plaintiff in his or her employment, and if the plaintiff has further established by *direct evidence* that the protected conduct was a substantial or motivating factor in the adverse employment action, then the defendant bears the burden to show that its legitimate

> reason, standing alone, would have induced it to make the same decision. If, however, the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided under the principles enunciated in *McDonnell Douglas* and *Burdine*, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken for retaliatory purposes.

Newberne, 359 N.C. at 794, 618 S.E.2d at 209-10 (citations, alterations, and internal quotation marks omitted) (emphasis in original). In a footnote, our Supreme Court acknowledged that Justice O'Connor's concurrence and the direct evidence requirement has since been abrogated as acknowledged in *Desert Palace*, but nevertheless states this abrogation "applies only to claims brought under Title VII of the Civil Rights Act of 1964." *Id.* at 793-94, 618 S.E.2d at 209, n.4.

Given that sex is a protected characteristic analogous to the protected activity under the Whistleblower Act, *Newberne* requires us to apply its framework to claims of discrimination on the basis of sex under N.C.G.S. § 126-34.02.

3. Discussion

The ALJ made the following conclusions in its Final Decision:

> 17. Petitioner has easily established the first three prongs of a prima facie case of sex discrimination for failure to promote. She belongs to a protected class, she applied for the Tech III position, and the Department doesn't dispute that Petitioner was qualified for the position. It is less clear that Petitioner was rejected under circumstances giving rise to an inference of unlawful discrimination. Nonetheless, the undersigned will proceed as though Petitioner satisfied all four elements of a prima facie case of sex discrimination.
>
> . . .
>
> 20. The Department has articulated a legitimate, non-discriminatory basis for not selecting Petitioner for the promotion. Specifically, [Doe] was the most qualified candidate. [Doe] had more education (a bachelor's degree as compared to Petitioner's High School diploma), more supervisory experience, and was rated higher on the interview.

Having determined, or at least assumed, that Johnson established a prima facie case of discrimination on the basis of sex and that NCDPS

introduced evidence of a legitimate, nondiscriminatory reason for the employment action, the ALJ next determined whether Johnson offered direct evidence that sex was a substantial or motivating factor in the employment action.

"In saying that [sex] played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be" the sex of applicant or employee. *Price Waterhouse*, 490 U.S. at 250, 104 L. Ed. 2d. at 287-88. Direct evidence of sex as a motiving factor "has been defined as evidence of conduct or statements that both reflect directly the alleged [discriminatory] attitude and that bear directly on the contested employment decision." *Newberne*, 359 N.C. at 792, 618 S.E.2d at 208-09 (citation, alteration, and internal quotation marks omitted). Moreover, "direct evidence does not include stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself." *Id.*

The ALJ concluded that Johnson failed to produce direct evidence that sex was a motivating factor in the employment action, making the *Price Waterhouse* mixed-motive framework inapplicable:

> 30. Petitioner argues that she produced direct evidence of discrimination which would require the undersigned to employ the discrimination analysis set forth in Justice O'Connor's concurrence in Price Waterhouse v. Hopkins, instead of the McDonnell Douglas "burden shifting" analysis. . . .
>
> 31. Petitioner relies on Avery's notation in the request for candidate pre-approval that "promoting Mr. [Doe] to the WFREO will also add diversity to an all female staff" as direct evidence of discrimination. Avery's comment is not direct evidence of discrimination. To show discrimination by direct evidence, a plaintiff typically must show discriminatory motivation on the part of the decision maker involved in the adverse employment action. As discussed above, Avery was motivated to hire [Doe] because he was the most qualified candidate. Avery did not deny Petitioner the promotion because of her sex, nor did Avery promote [Doe] because of his sex.

We agree with Johnson that Conclusion of Law #31 was made in error.

The undisputed statement made by Avery that Doe "will also add diversity to an all female staff" is necessarily premised upon Doe's sex. That is, Doe adds diversity to an all-female staff *because* he is a male. Avery's use and reference to Doe's sex in the justification for hire, taken at face value, exhibit her view that his sex as a male was a benefit – a benefit that Johnson, as a female, could not offer simply by the nature of her sex. While gender may certainly "play a role in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion[,]" this is not that situation. *Price Waterhouse*, 490 U.S. at 277, 104 L. Ed. 2d. at 305 (O'Connor, J., concurring). NCDPS argues that "Johnson's contention that the reference to diversity alone constituted direct evidence of discriminatory motive is misplaced[,]" and cites several federal district court cases addressing diversity policies in support of this argument. *See Bernstein v. St. Paul Cos., Inc.*, 134 F. Supp. 2d 730, 739 n. 12 (D. Md. 2001); *Reed v. Agilent Techs., Inc.*, 174 F. Supp. 2d 176, 185 (D. Del. 2001). These cases, however, are inapposite. This is not a challenge to an entity's diversity policy or the existence of a general policy promoting diversity awareness – it is a challenge to a specific hiring decision.

Additionally, Avery's statement bore directly on the contested employment action and was not made by an individual unrelated to the decisionmaking process. It strains credulity to argue that Avery's statement, made on an official employment document listing the "JUSTIFICATION" for hire, does not bear directly on the contested employment action – which candidate to hire. The ALJ found that "Avery was the decision maker in the hiring process for the Tech III position." Her statement regarding Doe adding diversity to an all-female staff was made in Avery's "Request for Candidate Pre-Approval." Murray then adopted Avery's recommendation, including the justification, wholesale and without making any alterations. This remark was also not made outside of the decisionmaking process.

For these reasons, the ALJ erred in concluding that this evidence was not direct evidence and thus erred in failing to apply the *Price Waterhouse* mixed-motive framework.[1] The State argues that "assuming,

1. Johnson challenges numerous Findings of Fact, arguing these challenged findings "led [the ALJ] to conclude that *Price Waterhouse* did not apply to this case." We have concluded that, based upon the undisputed statement in the justification for the recommendation to hire Doe, the ALJ erred in failing to apply *Price Waterhouse* and that a new determination under that framework is required. We need not address these additional Findings of Fact.

arguendo, that the evidence presented by Johnson is properly characterized as direct evidence, the virtual entirety of the remaining evidence presented below demonstrated that the Department would have made the same hiring decision regardless of [Doe's] gender." It contends, "under either analytical framework, Johnson's discrimination claim failed as a matter of law and the evidence supported a finding that no sex discrimination occurred." It is beyond our role as an appellate court to reweigh evidence under a fundamentally different burden-shifting framework. *See Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995) ("Employment discrimination law recognizes an important distinction between mixed-motive and pretext cases. The distinction is critical, because plaintiffs enjoy more favorable standards of liability in mixed-motive cases . . . ."), *overruled in part by Desert Palace, Inc. v. Costa*, 539 U.S. 90, 156 L. Ed. 2d 84 (2003). This is solely the role of the ALJ. As such, our holding goes no further than to reverse and remand for the ALJ to apply the correct framework, reweigh the evidence accordingly, and issue a new Final Decision.

B. Veteran's Preference

[2] Johnson also contends the trial court erred in concluding that she failed to meet her burden of proof that NCDPS failed to properly apply a veterans' preference. We disagree.

N.C.G.S. § 126-80 states:

> It shall be the policy of the State of North Carolina that, in appreciation for their service to this State and this country during a period of war, and in recognition of the time and advantage lost toward the pursuit of a civilian career, veterans shall be granted preference in employment for positions subject to the provisions of this Chapter with every State department, agency, and institution.

N.C.G.S. § 126-80 (2017). It is the applicant's burden to "submit a DD Form 214, Certificate of Release or Discharge from Active Duty, along with a State Application for Employment . . . to the appointing authority." 25 N.C.A.C. 1H.1102. The appointing authority is then "responsible for verifying eligibility and may request additional documentation as is necessary to ascertain eligibility." *Id.* The veterans' preference applies in limited circumstances when an applicant is applying for a promotion:

> (d) For promotion, reassignment and horizontal transfer, after applying the preference to veterans who are current State employees as explained under Subparagraph (a)(1)

> or (2) of this Rule, the eligible veteran receives no further preference and competes with all other applicants who have substantially equal qualifications.

25 N.C.A.C. 1H.1104(d).

We need not reach the question of whether the ALJ erred in concluding that Johnson failed to meet her burden that NCDPS improperly applied the veterans' preference. Johnson concedes that, even if we were to assume the preference was improperly applied, that failure was harmless in her case, as she was granted an interview and competed with all other applicants with substantially equal qualifications. We dismiss this argument as moot.

CONCLUSION

Johnson presented direct evidence that sex was a substantial and motivating factor in the adverse employment action taken against her. Accordingly, the ALJ erred in failing to apply the *Price Waterhouse* burden-shifting framework, and we reverse and remand for further proceedings under the proper framework. Johnson's argument that NCDPS failed to properly apply the veteran's preference is dismissed.

REVERSED AND REMANDED IN PART; DISMISSED IN PART.

Judges DILLON and ARROWOOD concur.

NORTH CAROLINA INDIAN CULTURAL CENTER, INC., PLAINTIFF
v.
MACHELLE SANDERS, SECRETARY, N.C. DEPARTMENT OF ADMINISTRATION, IN HER OFFICIAL CAPACITY, FURNIE LAMBERT, CHAIRMAN, N.C. STATE COMMISSION OF INDIAN AFFAIRS, IN HIS OFFICIAL CAPACITY, N.C. DEPARTMENT OF ADMINISTRATION, N.C. COMMISSION OF INDIAN AFFAIRS, STATE OF NORTH CAROLINA, AND PAUL BROOKS, DEFENDANTS

No. COA18-807

Filed 18 June 2019

1. Contracts—lease of state-owned property—implied covenant of quiet enjoyment—no breach

At the summary judgment phase of an action where the State leased property—to be used for a Native American cultural center—to plaintiff nonprofit corporation but later enacted a session law terminating the lease, the trial court properly ruled in favor of the State defendants on plaintiff's claim for breach of the implied covenant of quiet enjoyment. Plaintiff never disputed that it defaulted on the lease, the evidence showed that the State defendants terminated the lease pursuant to its terms after giving plaintiff notice and an opportunity to cure the default, and plaintiff failed to show constructive eviction where it offered no evidence that the State defendants' actions forced it to abandon the property.

2. Constitutional Law—lease of state-owned property—legislation terminating lease—no constitutional violations

Where plaintiff nonprofit corporation alleged multiple violations of the state and federal constitutions after the State leased property to plaintiff but later enacted a session law terminating the lease, the trial court properly found no violations under the Contracts Clause, the prohibition against Bills of Attainder, the Takings Clause, the Due Process Clause, or under general separation-of-powers principles because, among other things, the legislation neither changed the parties' obligations nor barred plaintiff from asserting its rights under the lease or from seeking legal remedies through judicial action.

3. Statutes of Limitation and Repose—voluntary dismissal of prior action—based on insufficient service of process—limitations period not tolled

Where a nonprofit sued the former chairman of a state commission for tortious interference with a contract and damages under

42 U.S.C. § 1983, and then obtained a voluntary dismissal of the action without prejudice, the trial court properly dismissed the nonprofit's second complaint asserting the same claims. Not only did the three-year statute of limitations for both claims expire well before plaintiff filed the second complaint, but also the voluntary dismissal of the prior action did not toll the limitations period where, based on the record, the nonprofit never properly served the defendant with the first complaint.

Appeal by Plaintiff from Order entered 23 April 2018 by Judge D. Thomas Lambeth, Jr. in Wake County Superior Court. Heard in the Court of Appeals 14 February 2019.

Linck Harris Law Group, PLLC, by David H. Harris, Jr., for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General G. Mark Teague, for the State.

Lewis Brisbois Bisgaard & Smith LLP, by Christopher Derrenbacher, for defendant-appellee Paul Brooks.

HAMPSON, Judge.

Factual and Procedural Background

North Carolina Indian Cultural Center, Inc. (Plaintiff) appeals from an Order (1) granting summary judgment in favor of the State of North Carolina (State), the North Carolina Department of Administration (DOA), the North Carolina Commission of Indian Affairs (Commission), Machelle Sanders (Sanders), Secretary of the DOA, in her official capacity, and Furnie Lambert (Lambert), Chairman of the Commission, in his official capacity (collectively, the State Defendants); (2) denying Plaintiff's Motion for Partial Summary Judgment; and (3) dismissing Plaintiff's Complaint against Paul Brooks (Brooks). The Record before us tends to show the following:

Beginning in or around 1983, the State began acquiring land in Maxton Township in Robeson County (Property) for the purpose of ultimately developing the North Carolina Indian Cultural Center (Cultural Center) with a focus on the heritage and culture of North Carolina's Native Americans. Plaintiff incorporated as a non-profit corporation in 1985 to "develop, establish, manage, furnish, equip, maintain, preserve,

exhibit and interpret to the public the North Carolina Indian Cultural Center . . . ." Plaintiff has its own Board of Directors appointed under its Articles of Incorporation.

In 1989, the General Assembly enacted legislation directing the State to enter into a 99-year lease of the Property with Plaintiff for the sum of $1.00 per year for the establishment of the Cultural Center. The legislation also called for the lease to include certain terms and conditions, such as requiring Plaintiff to obtain funding of $4.16 million for the Cultural Center within five years of a lease agreement. 1989 N.C. Sess. Law 1074, § 18. In 1992 and 1993, the General Assembly amended this legislation by excluding from the prospective lease a portion of the Property used for a golf course, extending the timeframe for the State and Plaintiff to enter into a lease, and easing Plaintiff's funding requirements. *See* 1991 N.C. Sess. Law 900, § 22; 1993 N.C. Sess. Law 88, § 1; 1993 N.C. Sess. Law 561, § 33.

On 12 May 1994, Plaintiff and the State entered into a lease agreement for the Property, excluding the golf course (Lease). The Lease, among other provisions, included requirements that Plaintiff: maintain and improve the premises at no cost to the State; furnish utilities, including water service, to the Cultural Center; maintain certain insurance policies; provide ingress and egress via the main road through the Property, including to permit access to the golf course; and not sublease or assign the Lease without prior written approval from the DOA. The Lease was amended, pursuant to legislation, in 1997 to add an additional parcel of land to the Property and Lease and to reduce Plaintiff's funding obligation to $3 million. 1997 N.C. Sess. Law 41, § 1. The Lease was further amended, pursuant to additional legislation, in 2001 to eliminate the funding obligation altogether. 2001 N.C. Sess. Law 89, § 1.

The 1997 legislation also required Plaintiff to reorganize with a Board of Directors appointed by the Commission. 1997 N.C. Sess. Law 41, § 2. This legislation was amended in 2003, changing the makeup of Plaintiff's Board of Directors but leaving the Commission with the authority to appoint directors. 2003 N.C. Sess. Law 260, § 1 (hereinafter, 2003 Legislation). In 2009, an Administrative Law Judge issued a decision blocking the Commission from appointing directors, which was subsequently adopted as a Final Agency Decision by the Commission. Subsequently, in 2011, a Superior Court Judge declared the 2003 Legislation unconstitutional.

In March 2010, a team from the State Construction Office, an office within the DOA, inspected the Property and on 26 March 2010 issued

a Facility Condition Assessment Report (FCAR) on the Property. The FCAR identified a number of deteriorated or dilapidated buildings on the Property (including on the golf course) that needed significant repair or demolition. The FCAR observed there was vandalism throughout the site, theft of electrical wiring, and exposed wiring posing safety problems. With respect to the Cultural Center, the FCAR recommended a theater complex used for an outdoor drama be rebuilt, as it was in such an advanced state of deterioration it was unsafe for public access. In addition, the FCAR indicated the Cultural Center museum required substantial repairs, including complete renovation of the interior along with complete replacement of the electrical system. Among other things, the FCAR noted the museum had various Building Code violations and safety hazards, including exposed electrical wiring and its restrooms were unsuitable for public use. The FCAR further recommended demolition of a warehouse attached to the museum because it was in such poor condition. In his affidavit, John F. Webb, III, the Manager of the Leasing and Space Planning Section of the DOA, calculated the amount needed to make the immediate repairs necessary for the portion of the Property leased to Plaintiff was $2.083 million.

On 18 January 2011, the State issued Plaintiff a letter (Default Letter) detailing a number of claimed defaults under the lease, including failure to maintain and improve the leased premises as set out in the FCAR; failure to pay for water service to the Cultural Center; failure to obtain required insurance coverage; subleasing without prior written approval; and hindering access to patrons of the golf course. In addition, the Default Letter expressly invoked a requirement under the terms of the Lease that Plaintiff begin efforts to cure the defaults within 60 days and remedy the defaults within 120 days.

Plaintiff's then attorney formally responded by email on or about 17 March 2011, disputing any default under the Lease. Plaintiff, through its counsel, indicated Plaintiff had begun to address each of the concerns raised by the State, including obtaining new insurance policies. Plaintiff also asserted the Commission and DOA had interfered with Plaintiff's efforts to maintain the Property and interfered in contractual arrangements, including having "conspired and collaborated" with a private corporation to operate the golf course on the Property. Plaintiff further claimed the Commission and DOA "sabotaged the work" of the Cultural Center and resultantly were themselves responsible for the conditions on the Property. On 28 April 2011, in reply, the State sent Plaintiff correspondence disputing Plaintiff's assertions and noting the State was provided no evidence of efforts to cure the defaults.

On 3 October 2011, the Office of State Fire Marshall issued a report (Fire Marshall Report) to the DOA, identifying a number of Building and Fire Code violations existing on the Property, including at the theater, museum store, and warehouse. This Report also noted the theater stage, built in 2007, had not received necessary approvals prior to construction and appeared to be in violation of the Building Code as well.

In June 2012, the Joint Legislative Program Division Oversight Committee of the General Assembly directed its Program Evaluation Division to evaluate the current and long-term disposition of the Property. The Program Evaluation Division delivered its report on 12 December 2012 (PED Report). The PED Report noted many of the same problems as the 2010 FCAR and 2011 Fire Marshall Report, including dilapidated buildings, exposed wiring, vandalism, and theft of copper wiring. The PED Report identified over $2.1 million in necessary repairs to the Property, including demolition of the museum, warehouse, and amphitheater complex.

This PED Report further acknowledged that while the State had declared Plaintiff in default under the Lease, the DOA felt constrained from proceeding further by the legislative directive contained in the 1989 Session Law, as later amended, requiring the State to specifically enter into the Lease with Plaintiff. Among other recommendations, the PED Report recommended the General Assembly enact legislation terminating the Lease.

On 26 June 2013, Session Law 2013-186 was enacted, directing the DOA to terminate the Lease to Plaintiff within 15 days. *See* 2013 N.C. Sess. Law 186, § 2. On 10 July 2013, the DOA issued notice to Plaintiff that the Lease would terminate in 60 days. In 2014, a substantial portion of the Property previously leased to Plaintiff was sold to the Lumbee Tribe of North Carolina. The remainder was reallocated to the North Carolina Department of Environment and Natural Resources for incorporation into the Lumber River State Park.

On 3 October 2013, Plaintiff filed an amended complaint[1] against the DOA, the Commission, the State, as well as Brooks, a former Chairman of the Commission and then Chair of the Tribal Council of the Lumbee Tribe, Inc. (2013 Complaint). In the 2013 Complaint, Plaintiff alleged breach of contract and various constitutional violations, seeking both damages and a declaratory judgment that Session Law 2013-186 was unconstitutional.

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1. The original complaint from this action is absent from the record.

The Record reflects no proof the 2013 Complaint was served on Brooks. On 10 February 2014, Brooks filed Motions to Dismiss and an Answer to the 2013 Complaint, alleging, *inter alia*, failure by Plaintiff to provide proof of service of the 2013 Complaint on Brooks. On 11 March 2016, prior to Brooks's Motions being heard, Plaintiff filed a Notice of Voluntary Dismissal Without Prejudice.

On 6 March 2017, Plaintiff filed the present action against the State Defendants and Brooks (collectively, Defendants). In this Complaint, Plaintiff alleged Defendants' actions "were taken with the clear intent to breach the Ground Lease" and that the Lease was a valid contract, constituting waiver of sovereign immunity. Plaintiff further alleged breach of contract against the State Defendants and sought a declaratory judgment that Session Law 2013-186 was invalid. Against Brooks specifically, Plaintiff alleged tortious interference with contract and a claim for damages pursuant to 42 U.S.C. § 1983. Plaintiff sought various damages and the return of the leased portion of the Property from the State.

On 24 May 2017, the State Defendants filed a Motion to Dismiss under Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. On 12 June 2017, Brooks filed a Motion to Dismiss under Rules 12(b)(1), (2), (4), (5), and (6) of the North Carolina Rules of Civil Procedure. In his Motion, Brooks alleged, *inter alia*, that Plaintiff failed to provide proof of service of process of the 2013 Complaint prior to taking a voluntary dismissal and that Plaintiff's Complaint was thereby barred by the statute of limitations.

On 19 February 2018, the State Defendants filed a Motion for Summary Judgment. On 16 March 2018, Plaintiff filed a Motion for Partial Summary Judgment "on the issues of liability[.]" On 23 April 2018, the trial court entered its Order granting summary judgment to the State Defendants, denying Plaintiff's Partial Summary Judgment Motion, and granting Brooks's Motion to Dismiss.

Issues

The dispositive issues in this case are whether: (I) the trial court erred in granting summary judgment for the State Defendants and denying partial summary judgment for Plaintiff on the breach-of-contract and constitutional claims; and (II) Plaintiff's voluntary dismissal of the 2013 Complaint tolled the statute of limitations on the claims against Brooks where there is no proof he was served with the 2013 Complaint.

Analysis

I. Summary Judgment Motions

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

B. Breach of Contract

[1] Plaintiff first argues the trial court erred in granting summary judgment to the State Defendants and, in turn, denying Plaintiff partial summary judgment on its breach-of-contract claim. Plaintiff contends the State Defendants breached the Lease by (1) attempting to appoint directors under the 2003 Legislation; (2) failing to prevent vandalism on the Property; and (3) enacting Session Law 2013-186 requiring termination of the Lease.

Notably, although Plaintiff disputes the nature, extent, and cause of Plaintiff's defaults under the Lease, Plaintiff makes no contention it was not, in fact, in default. Indeed, the pleadings and affidavits submitted by the State demonstrate a number of areas in which Plaintiff was in default, including failing to procure necessary insurance policies and failing to maintain the leased portion of the Property. Despite being put on notice of these defaults, particularly as to the dilapidated nature of the Property, Plaintiff failed to take steps to cure its default between 2010, when the FCAR issued, and the end of 2012 when the PED Report issued, with both Reports detailing many of the same problems.

Rather, Plaintiff contends it was the State Defendants who were in breach of the Lease by breaching the implied covenant of "quiet enjoyment." "[T]he provisions of a lease are interpreted according to general principles of contract law." *Wal-Mart Stores, Inc. v. Ingles Mkts., Inc.*, 158 N.C. App. 414, 418, 581 S.E.2d 111, 115 (2003) (citation omitted). " 'Under North Carolina law, . . . a lease carries an implied warranty that the tenant will have quiet and peaceable possession of the leased premises during the term of the lease[,] . . . stand[ing] for the principle that a landlord breaches the implied covenant of quiet enjoyment when he constructively evicts the tenant.' " *Charlotte Eastland Mall, LLC v. Sole Survivor, Inc.*, 166 N.C. App. 659, 663, 608 S.E.2d 70, 73 (2004) (alterations in original) (quoting *K & S Enters. v. Kennedy Office*

Supply Co., 135 N.C. App. 260, 267, 520 S.E.2d 122, 126-27 (1999), *aff'd per curiam*, 351 N.C. 470, 527 S.E.2d 644 (2000)). "An act of a landlord which deprives his tenant of that beneficial enjoyment of the premises to which he is entitled under his lease, causing the tenant to abandon them, amounts to a constructive eviction. Put another way, when a landlord breaches a duty under the lease which renders the premises untenable, such conduct constitutes constructive eviction." *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 92, 394 S.E.2d 824, 830 (1990) (citations omitted). "A tenant seeking to show constructive eviction has the burden of showing that he abandoned the premises within a reasonable time after the landlord's wrongful act." *K & S Enters.*, 135 N.C. App. at 266-67, 520 S.E.2d at 126 (citation omitted).

Specifically, Plaintiff argues the Commission's efforts to appoint directors to Plaintiff's Board pursuant to the 2003 Legislation constituted a constructive eviction. However, the Commission's own Final Agency Decision blocking enforcement of the 2003 Legislation was issued in May 2010. Plaintiff made no allegation in its Complaint and offered no evidence at summary judgment that it was forced to abandon the Property during this time. Indeed, the Record demonstrates Plaintiff did not abandon the Property until after enactment of Session Law 2013-186 when the Lease was, in fact, terminated. Moreover, Plaintiff makes no showing that the State Defendants' actions resulted in Plaintiff falling into default under the Lease.

To the contrary, Plaintiff submitted two affidavits in support of its case. One from Bobbie Jacobs-Ghaffar (Jacobs-Ghaffar), a former employee of Plaintiff 1990–1994. Jacobs-Ghaffar spoke to the work done by Plaintiff and its value and history in the community during her employment in the early 1990s. The second more salient affidavit was from Beverly Collins-Hall (Collins-Hall), an active member of Plaintiff and spouse of the current Board Chair. Collins-Hall served as a Site Administrator at the Cultural Center 2001–2003 and again 2009–2013. In her affidavit, Collins-Hall emphasized the importance of Plaintiff and its facility in the community; her belief that "the Commission on Indian Affairs was an enemy" to Plaintiff; and various acts of vandalism to the Cultural Center. Collins-Hall further stated 2009–2013 she supervised 24 full-time employees at the Cultural Center and highlighted upgrades and maintenance to the Property during that period, as well as providing numerous photographs of the Property. Collins-Hall's affidavit in particular shows Plaintiff did not abandon the Property.

Plaintiff also claims the State Defendants breached the implied warranty of quiet enjoyment by allowing vandalism to occur at the Cultural

Center. "However, it is long-settled that '[t]he covenant of quiet enjoyment . . . does not extend to the acts of trespassers and wrongdoers[.]' " *Charlotte Eastland Mall, LLC*, 166 N.C. App. at 663, 608 S.E.2d at 73 (alterations in original) (quoting *Huggins v. Waters*, 167 N.C. 197, 198, 83 S.E. 334, 334 (1914)). As in *Charlotte Eastland Mall*, Plaintiff does "not cite any cases in support of the proposition that the implied covenant of quiet enjoyment imposes upon [defendant]-landlord the duty to a commercial tenant to prevent criminal acts by third parties, and we find none." *Id.*

Lastly, Plaintiff asserts the enactment of Session Law 2013-186, directing termination of the Lease, itself constitutes a breach. Plaintiff points to no authority for its position. Indeed, the evidence reflects the enactment of Session Law 2013-186 was consistent with the State's rights under the Lease. The State provided timely notice of default and gave Plaintiff an extended opportunity to cure its defaults. The evidence is undisputed the DOA sought this legislation for no other reason than to ensure its own compliance with legislative directives, since the General Assembly had directed the DOA to lease the premises specifically to Plaintiff. Consequently, Session Law 2013-186 did not constitute a breach of the Lease but rather constituted the State's enforcement of its right to terminate under the terms of the Lease.

Accordingly, we conclude where it is undisputed Plaintiff was in default under the Lease, the State Defendants terminated the Lease pursuant to its terms after giving notice of default and an opportunity to cure, and Plaintiff has made no showing of its abandonment of the premises constituting constructive eviction, the trial court did not err in granting summary judgment in favor of the State Defendants on Plaintiff's breach-of-contract claim. Consequently, the trial court also did not err in denying Plaintiff's Motion for Partial Summary Judgment on this ground.

C. Constitutional Claims

[2] Plaintiff next asserts the trial court erred in granting summary judgment to the State Defendants on Plaintiff's claim that the enactment of Session Law 2013-186 violated a host of provisions of both the North Carolina and United States Constitutions, including the Contract Clause, prohibition on Bills of Attainder, the Takings Clause, due process protections of the Fourteenth Amendment, and general separation-of-powers principles. At the heart of Plaintiff's constitutional arguments is its position that Session Law 2013-186, by legislative action, bars Plaintiff from asserting rights under the Lease and seeking legal remedies through judicial action.

As such, Plaintiff first contends Session Law 2013-186's termination of the Lease constitutes an unconstitutional impairment of contract under the federal Constitution. "It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, 52 L. Ed. 2d 92, 106 (1977) (citations omitted). "Yet the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects. Thus, as a preliminary matter, appellant's claim requires a determination that the repeal has the effect of impairing a contractual obligation." *Id.* (footnote omitted).

As our North Carolina Supreme Court has noted: "Not every modification of a contractual promise, however, impairs the obligation of contract." *Smith v. State*, 298 N.C. 115, 128, 257 S.E.2d 399, 407 (1979) (citing *El Paso v. Simmons*, 379 U.S. 497, 506-07, 13 L. Ed. 2d 446, 453-54 (1965)). Here, though, we are faced with the State's termination of the Lease to which it was a party. Although the parties provide no direct authority addressing such an instance, we find guidance from the Fourth Circuit, in turn, guided by the Seventh Circuit:

> As the Seventh Circuit has explained, "when a state repudiates a contract to which it is a party it is doing nothing different from what a private party does when the party repudiates a contact; it is committing a breach of contract." *Horwitz–Matthews, Inc. v. City of Chicago*, 78 F.3d 1248, 1250 (7th Cir.1996). We wholeheartedly agree with our learned colleagues that "[i]t would be absurd to turn every breach of contract by a state or municipality into a violation of the federal Constitution." *Id.* If the offended party retains the right to recover damages for the breach, the Contracts Clause is not implicated; if, on the other hand, the repudiation goes so far as to extinguish the state's duty to pay damages, it may be said to have impaired the obligation of contract.

Crosby v. City of Gastonia, 635 F.3d 634, 642 n.7 (4th Cir. 2011) (citation omitted). This is consistent with our Supreme Court's holding in *Smith*, concluding there was no impairment of a contract where a legislative amendment made "no change in either the obligations of the parties or the remedies available to plaintiff in enforcing [its] agreement." *Smith*, 298 N.C. at 129, 257 S.E.2d at 407.

Here, of course, Plaintiff has asserted a breach-of-contract claim, and the State Defendants have not contended—and, indeed, on the

Record before us could not contend—Session Law 2013-186 barred any right or remedy Plaintiff held under the Lease upon the State's repudiation of the Lease. Nor do the State Defendants argue this legislation acted as a statutory bar or defense to Plaintiff's breach-of-contract claim for damages or other similar remedy. *See Horwitz–Matthews, Inc.*, 78 F.3d at 1250-51 (citations omitted). Thus, we conclude the evidence of record demonstrates enactment of Session Law 2013-186 made "no change in either the obligations of the parties or the remedies available to plaintiff in enforcing [its] agreement." *Smith*, 298 N.C. at 129, 257 S.E.2d at 407. Rather, the Record in this case shows Session Law 2013-186 was enacted to effectuate the terms of the Lease, including its termination provisions, and to provide for the subsequent disposition of the Property, not to impair Plaintiff's rights under the Lease. Therefore, Session Law 2013-186 did not act as an unconstitutional impairment of contract.

For the same essential reasons, Session Law 2013-186 does not constitute a Bill of Attainder because it was not punitive or retributive against Plaintiff. *See Citicorp v. Currie, Comr. Of Banks*, 75 N.C. App. 312, 316, 330 S.E.2d 635, 638 (1985) ("A [Bill of Attainder] is a legislative act that inflicts punishment on a person without a [judicial] trial."). It merely directed the DOA to proceed with termination of the Lease. Session Law 2013-186 did not deprive Plaintiff of any rights it had in the enforcement of the Lease or limit its remedies for the State's termination of the Lease. It did not bar Plaintiff from leasing any other property or otherwise continuing to operate. Rather, the legislation sought to advance "what the General Assembly determined was a legitimate state interest" in the use and disposition of State-owned property following Plaintiff's default under the existing Lease. *See id.* at 316-17, 330 S.E.2d at 638.

Nor does the State Defendants' assertion of rights under the Lease give rise to a takings claim. *See Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) ("The interferences with plaintiffs' lease rights were grounded on matters that, at times material herein, bespoke an effort to operate within the framework of the lease and applicable regulations, not to take plaintiffs' property rights. If defendant's interferences were unjustified or unreasonable, plaintiffs' rights emanate from the lease agreement, not the Fifth Amendment.").

Similarly, Plaintiff's claims of violations of due-process and separation-of-powers principles likewise fail. Plaintiff asserts Session Law 2013-186 precludes judicial determination of whether the Lease should be terminated. However, nothing in Session Law 2013-186 limited

Plaintiff's right to seek a judicial determination either through the context of forcing a summary-ejectment action or through an action, like the present one, for breach of contract. Consequently, the trial court did not err in granting summary judgment for Defendants and in denying partial summary judgment for Plaintiff on these constitutional claims.

II. Brooks's Motion to Dismiss

A. Standard of Review

[3] "A statute of limitations or repose defense may be raised by way of a motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994) (citations omitted). Under Rule 12(b)(6), this Court conducts "a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673-74 (2003).

In addition to the statute of limitations, Brooks also asserted defenses of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. We review a trial court's decision to grant a motion to dismiss for lack of personal jurisdiction to see "whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate." *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 257 (2012) (citations and quotation marks omitted). "We review *de novo* questions of law implicated by the denial of a motion to dismiss for insufficiency of service of process." *New Hanover Cty. Child Support Enf't ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012) (citation omitted).

B. Statute of Limitations

Here, Plaintiff alleged claims against Brooks for tortious interference with contract and under 42 U.S.C. § 1983, based on his alleged role in the enactment of Session Law 2013-186 on 26 June 2013. Brooks moved to dismiss the claims against him under Rule 12(b)(6) on the basis, *inter alia*, that the Complaint showed on its face that the statute of limitations on Plaintiff's claims against him had expired.

The statute of limitations for both of Plaintiff's claims against Brooks is three years. "A plaintiff seeking to recover damages or to obtain other relief for . . . tortious interference with contract . . . must assert that claim within three years of the date upon which the underlying injury

occurred." *Glynne v. Wilson Med. Ctr.*, 236 N.C. App. 42, 48, 762 S.E.2d 645, 649 (2014) (citing N.C. Gen. Stat. § 1-52(5)). "The three year statute of limitations as set forth in N.C.G.S. § 1-52 applies to 42 U.S.C. § 1983 actions brought in the North Carolina court system." *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 367, 424 S.E.2d 420, 424 (citations omitted), *aff'd per curiam*, 335 N.C. 158-60, 436 S.E.2d 821-22 (1993).

Here, Plaintiff contends, and the face of the Complaint demonstrates, the enactment of Session Law 2013-186 constituted the underlying injury allegedly caused by Brooks's actions. Plaintiff's Complaint in the instant action was not filed until 6 March 2017, over three years after the alleged injury occurred. Thus, on the face of the Complaint, Brooks's Rule 12(b)(6) Motion alleging the expiration of the statute of limitations was properly brought.

"Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted). "A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Id.* (citation omitted). Here, Plaintiff contends the voluntary dismissal of the 2013 Complaint without prejudice tolled the statute of limitations and allowed the filing of the new Complaint within one year. We disagree.

At the outset, we note resolution of this issue requires us to review matters outside of the pleadings. *See N.C. Railroad Co. v. Ferguson Builders Supply*, 103 N.C. App. 768, 771, 407 S.E.2d 296, 298 (1991) (earlier complaints and voluntary dismissals not referenced in pleading at issue constituted materials outside the pleadings for purposes of Rule 12(b)(6)). As such, we follow the lead of our prior case law addressing the same issue and review the parties' contentions on the impact of Plaintiff's voluntary dismissal of the 2013 Complaint on the statute of limitations through the lens of Rules 12(b)(2) (lack of personal jurisdiction), 12(b)(4) (insufficiency of process), and 12(b)(5) (insufficiency of service of process). *See Lawrence v. Sullivan*, 192 N.C. App. 608, 666 S.E.2d 175 (2008); *Camara v. Gbarbera*, 191 N.C. App. 394, 662 S.E.2d 920 (2008).

In *Camara*, we recognized:

> If an action is commenced within the statute of limitations, and a plaintiff voluntarily dismisses the action without prejudice, a new action on the same claim may

> be commenced within one year. N.C. Gen. Stat. § 1A-1, Rule 41(a) (2007). However, a plaintiff must obtain proper service prior to dismissal in order to toll the statute of limitations for a year. In *Latham*, this Court held that if a voluntary dismissal is based on defective service, the voluntary dismissal does not toll the statute of limitations.

191 N.C. App. at 396-97, 662 S.E.2d at 922 (internal citations omitted) (citing *Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993)). In *Camara*, proper service of the original action was never made. *Id.* at 396, 662 S.E.2d at 921. This Court noted:

> Plaintiffs' argument that the subsequent action is valid because it was brought within one year as prescribed by Rule 41(a) does not take into account that proper service on defendant was never obtained prior to the voluntary dismissal. Because the service was defective, the statute of limitations did not toll.

Id. at 397, 662 S.E.2d at 922. Thus, where the subsequent action was filed outside the three-year statute of limitations, this Court upheld the trial court's dismissal of the subsequent action. *Id.*

In *Lawrence*, the plaintiff filed her initial complaint within the statute of limitations. 192 N.C. App. at 622, 666 S.E.2d at 183. The original summons was returned undelivered; however, an alias and pluries summons sent to the same address was signed for by someone other than the defendant. *Id.* The plaintiff filed an affidavit of service and took a voluntary dismissal without prejudice the same day. *Id.* The plaintiff then filed a new complaint within one year. The defendant filed a motion to dismiss along with an affidavit stating she was not residing at the address where the first complaint had been served and that she had not received the summons and complaint in the first action. *Id.* The plaintiff failed to present any evidence to the contrary. This Court noted, "As defendant was never properly served with the first complaint, plaintiff's voluntary dismissal without prejudice did not toll the statute of limitations." *Id.* at 623, 666 S.E.2d at 183 (citation omitted). As the second complaint was filed outside the statute of limitations, we, again, upheld the trial court's dismissal. *Id.*

In the present case, Brooks filed an affidavit stating he had no recollection of being served with a copy of the 2013 Complaint and summons. The only summons in the 2013 action directed to him is an unreturned alias and pluries summons. There is no proof of service of the 2013 Complaint or summons in the Record, and although Plaintiff contends

service was made in 2013, Plaintiff provided no evidence of service on Brooks. Therefore, on this Record, Brooks was never served with the 2013 Complaint, and Plaintiff's voluntary dismissal did not toll the statute of limitations. As the Complaint in this action was filed outside the three-year statute of limitations for the claims against Brooks, the trial court properly granted Brooks's Motion to Dismiss.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's 23 April 2018 Order granting summary judgment to the State Defendants, denying Plaintiff's Partial Summary Judgment Motion, and dismissing Plaintiff's Complaint against Brooks.

AFFIRMED.

Judges ZACHARY and BERGER concur.

R.C. KOONTS AND SONS MASONRY, INC., DAVID CRAIG KOONTS, AND ROY CLIFTON KOONTS, III, PLAINTIFFS
v.
FIRST NATIONAL BANK, F/K/A YADKIN BANK F/K/A NEWBRIDGE BANK F/K/A LEXINGTON STATE BANK, DEFENDANT

No. COA18-1075

Filed 18 June 2019

1. Appeal and Error—interlocutory appeal—denial of summary judgment—substantial right—possibility of inconsistent verdicts

In a case involving collateral seized and then sold by a bank, an interlocutory order denying a motion for summary judgment was immediately appealable where the bank asserted it would be deprived of a substantial right without immediate review—namely, that re-litigation of claims already tried was barred by res judicata and collateral estoppel, and if the second case were allowed to proceed, inconsistent verdicts might result.

2. Collateral Estoppel and Res Judicata—res judicata—prior lawsuit—same parties—same issues—collateral seized by bank

In a case involving collateral seized and then sold by a bank, claims related to the seizure and consequent damages were barred by res judicata where they were asserted in a prior lawsuit involving

the same factual issues and same parties and the suit resulted in a final judgment. The only claim allowed to go forward was one relating to the commercial reasonableness of the bank's disposition of the collateral under the Uniform Commercial Code, which was dismissed without prejudice by the trial court in the first lawsuit.

Appeal by defendant from order entered 5 July 2018 by Judge Martin B. McGee in Davidson County Superior Court. Heard in the Court of Appeals 21 May 2019.

Smith Law Group, PLLC, by Steven D. Smith, Matthew L. Spencer, and Jonathan M. Holt, for plaintiff-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and James C. Adams, II, for defendant-appellant.

ARROWOOD, Judge.

First National Bank, formerly known as Yadkin Bank, formerly known as NewBridge Bank, formerly known as Lexington State Bank ("defendant") appeals from an order denying its motion for summary judgment. For the reasons stated herein, we affirm in part and reverse in part.

I. Background

Defendant engages in commercial lending. On or about 22 November 2004, R.C. Koonts and Sons Masonry, Inc. (the "corporate plaintiff") obtained a $417,306.14 loan from defendant. The individual plaintiffs, plaintiff David Craig Koonts ("David Koonts") and plaintiff Roy Clifton Koonts, III ("R.C. Koonts"), who owned the corporate plaintiff at all times relevant to this action, guaranteed the loan.

The parties renewed the loan in 2005. As collateral, R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts (collectively, "plaintiffs") pledged all inventory, vehicles, accounts receivable, machinery, and equipment of the corporate plaintiff. Plaintiffs defaulted on the loan in 2007. The parties entered into a forbearance agreement on 19 December 2007, however, plaintiffs subsequently defaulted on the agreement.

On 15 January 2009, defendant filed suit against plaintiffs seeking repayment of the loan. Defendant also instituted a claim and delivery proceeding to seize the collateral pledged as security for the loan. Pursuant to a 12 February 2009 court order, defendant posted a surety bond and seized the collateral in a claim and delivery proceeding. Plaintiffs were

unable to secure a bond to recover the collateral. On 15 October 2012, the Honorable Theodore Royster of Davidson County Superior Court determined plaintiffs were liable to defendant on the loan.

Plaintiffs filed counterclaims challenging the propriety of the seizure of collateral and requesting consequential damages. Specifically, the counterclaims challenged the enforceability of defendant's security interest and of the forbearance agreement, defendant's right to seize the collateral, and the amount of the loan that remained outstanding. The counterclaims also alleged: the amount of collateral seized forced the corporate plaintiff out of business, the corporate plaintiff lost the rental value of the collateral due to the seizure, and defendant failed to maintain the collateral in proper condition, in violation of Article 9 of the Uniform Commercial Code ("UCC"). Defendant moved for summary judgment on plaintiffs' counterclaims.

The matter came on for hearing before the Honorable John O. Craig, III in Davidson County Superior Court on 15 June 2015. On 3 November 2015, the trial court entered an order granting partial summary judgment, as follows.

> 1. Insofar as [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts'] counterclaims challenge [the] seizure of collateral, pursuant to N.C. Gen. Stat. § 1-473, et. seq., they are hereby dismissed, with prejudice.
>
> 2. Insofar as [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts'] counterclaims arise out of Article 9 of the Uniform Commercial Code, N.C. Gen. Stat. § 25-9-100, et seq., for failure to make a commercially reasonable disposition of the collateral, [the] claims are not ripe at this time. The Court approves of [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] voluntary dismissal of such claims without prejudice, [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] shall not be required to pay the costs pursuant to Rule 41(d) when filing or refiling such counterclaims.
>
> 3. All other counterclaims of [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] are dismissed with prejudice.[1]

1. Alterations have been added for clarity because plaintiffs were the defendants in the first law suit, and defendant was the plaintiff.

Following a bench trial, the trial court ruled that plaintiffs owed defendant $708,373.80, plus interest accruing at 13.25% per annum, plus costs. The trial court entered the final judgment on 3 November 2015. Plaintiffs did not appeal.[2]

After defendant sold the collateral, plaintiffs filed the instant lawsuit, claiming defendant violated N.C. Gen. Stat. §§ 25-9-100, *et seq.*, (2017) and committed unfair and deceptive trade practices. Defendant answered the complaint on 3 August 2016, and moved for summary judgment on 20 April 2018. Defendants argued in particular that plaintiffs' claims were barred by *res judicata* and collateral estoppel, that plaintiffs lack standing, and that plaintiffs' claims were barred for failure to adduce evidence supporting the elements of their claims.

The matter came on for hearing before the Honorable Martin B. McGee in Davidson County Superior Court on 21 May 2018. The trial court denied defendant's motion for summary judgment by order entered 5 July 2018.

Defendant appeals the trial court's denial of summary judgment.

II. Discussion

Defendant argues the trial court erred by wholly denying its motion for summary judgment because *res judicata* and collateral estoppel bar all claims except the allegation that defendant disposed of the collateral in a commercially reasonable manner. Therefore, defendant argues the trial court erred when it did not grant partial summary judgment. We agree.

A. Grounds for Appellate Review

[1] At the outset, we must address the interlocutory nature of this appeal. Defendant contends the trial court's interlocutory order is immediately appealable because defendant would be deprived of a substantial right without immediate review. We agree.

"The denial of summary judgment is not a final judgment, but rather is interlocutory in nature." *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 589, 599 S.E.2d 422, 426 (2004) (citation and quotation marks omitted). As a matter of course, our Court does not review

2. The partial summary judgment order and the final order were amended twice; however, the amendments did not alter the dismissal of plaintiffs' counterclaims. The amendments only added language describing the seized collateral, which was required by the North Carolina Division of Motor Vehicles and the Federal Aviation Administration to permit defendant to proceed with the disposition of the property.

interlocutory orders. *Id.* "If, however, the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review, we may review the appeal under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1)." *Id.* (citation and internal quotation marks omitted).

"[T]he denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable." *Id.* at 589, 599 S.E.2d at 426 (citation and quotation marks omitted). However, a mere allegation that *res judicata* bars a suit "does not *automatically* affect a substantial right; the burden is on the party seeking review of an interlocutory order to show how it will affect a substantial right absent immediate review." *Whitehurst Inv. Properties, LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (emphasis in original). For an appellant "to meet its burden of showing how a substantial right would be lost without immediate review," the appellant must demonstrate: "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *Id.* at 96, 764 S.E.2d at 490 (citation and quotation marks omitted).

Here, defendant argues it was entitled to summary judgment on all claims except those arising out of Article 9 of the UCC, N.C. Gen. Stat. § 25-9-100, *et seq.*, for failure to make a commercially reasonable disposition of the collateral. Therefore, defendant contends, because plaintiffs' complaint includes allegations that were already litigated, or could have been litigated, in the prior case in addition to claims arising out of Article 9, the trial court's denial of its motion for summary judgment is immediately appealable because re-litigation of the claims is barred by *res judicata* and collateral estoppel. Absent immediate appeal, defendant would lose a substantial right because trial of the instant case could result in inconsistent judgments between the same parties involving the seizure of the same collateral. For the reasons that follow, we agree. Therefore, defendant's appeal is properly before this court.

B. *Res Judicata*

[2] First, defendant argues *res judicata* bars all claims except issues related to the commercial reasonableness of the disposition of the collateral.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011) (citation and quotation marks omitted). For an action to be barred by *res judicata*, "a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties." *Id.* (citation and quotation marks omitted). *Res judicata* bars both "matters actually determined or litigated in the prior proceeding" and also "all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Id.* at 7, 719 S.E.2d at 93 (citation and quotation marks omitted).

Here, it is undisputed that the parties in the instant action are the same parties that litigated the first suit, which resulted in a final judgment. Additionally, both suits rose from the same factual circumstances addressed by the first suit: When plaintiffs defaulted on defendant's loan to plaintiffs, defendant filed a complaint to enforce repayment. Defendant also caused a claim and delivery order of seizure of the items plaintiffs had pledged as collateral for the loan. Plaintiffs then raised various allegations in their counterclaims related to both the seizure and disposition of the collateral.

Although the first suit resulted in a final judgment, finding plaintiffs owed defendant $708,373.80, plus interest accruing at 13.25%, plus costs, and that defendant could sell the collateral, both parties anticipated plaintiffs would file a second suit based on this same collateral. The trial court specifically dismissed one of plaintiffs' counterclaims in the first suit, without prejudice, because it was not ripe:

> 2. Insofar as [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts'] counterclaims arise out of Article 9 of the Uniform Commercial Code, N.C. Gen. Stat. § 25-9-100, et seq., for failure to make a commercially reasonable disposition of the collateral, [the] claims are not ripe at this time. The Court approves of [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] voluntary dismissal of such claims without prejudice, [R.C. Koonts and Sons Masonry, Inc., R.C. Koonts, and David Koonts] shall not be

> required to pay the costs pursuant to Rule 41(d) when filing or refiling such counterclaims.

However, the complaint in the instant, second suit exceeds the counterclaim the trial court dismissed without prejudice in the first suit. The complaint specifically raises allegations related to the seizure of the collateral, an issue that was adjudicated in the first lawsuit:

> 15. R.C. Koonts and Sons was operated and been incorporated [*sic*] for 15 years, and operated as a partnership for 27 years to the formation of a corporation. R.C. Koonts and Sons operated and engaged in the masonry business continuously until Defendant *seized* Plaintiffs assets *thereby* putting them out of business. Plaintiffs had no assets with which to operate since said seizure of all its assets by Defendant, and has been closed since the seizure after many years of continuous, successful operation as a thriving business. . . .
>
> . . . .
>
> 17. Plaintiffs have been damaged for the loss of said assets in an amount to be determined at trial but believed to be in excess of $25,000.00.
>
> 18. In addition, Plaintiffs have been damaged in that they have lost their business and the use of said assets, which had a fair rental value of $50,000.00 per month for each month since the seizure of said assets on March 12, 2009.
>
> 19. Defendant's *seizure* of the assets of Plaintiffs, proximately caused the closure of the business of R.C. Koonts and Sons, damaging said Plaintiff by the loss of business and income, an amount to be determined at trial, since the closure of Plaintiffs' business continuing into an indefinite time into the future.
>
> 20. Defendant's *seizure* of the helicopter of Defendant David Craig Koonts has proximately caused and damaged said Plaintiff in the fair market value and rental value of the helicopter in an amount to be determined at trial but believed to be in excess of $25,000.00[.]

(Emphasis added).

Clearly, these claims relate to the *seizure* of the collateral. Allegations related to the collateral's seizure were litigated in the first lawsuit, where the trial court determined "Plaintiff was legally permitted to seize all of the machinery, equipment and other collateral[.]" Therefore, all of defendant's counterclaims related to the seizure of collateral pursuant to N.C. Gen. Stat. § 1-473, *et seq.*, in the first suit were dismissed. Accordingly, *res judicata* bars these claims and the damages plaintiffs prayed for in their complaint related to allegations of an improper seizure, and loss of the business due to the seizure, cannot be recovered. To hold otherwise could result in inconsistent verdicts related to the seizure of the collateral.

In sum, the 3 November 2015 order makes clear that all claims except those arising out of Article 9 of the UCC, N.C. Gen. Stat. § 25-9-100, *et seq.*, for failure to make a commercially reasonable disposition of the collateral were decided in the first suit. Therefore, plaintiffs' attempts to bring claims outside of those arising out of Article 9 of the UCC are barred by *res judicata*. Plaintiffs can no longer request damages based on allegations that the business could not continue after the seizure of the collateral, that defendant seized more collateral than it was entitled to seize, that the seizure proximately caused the loss of the business, and that the business was damaged because it did not have the use of the collateral after the seizure. Furthermore, to the extent the second claim, alleging unfair and deceptive trade practices, relates to anything other than the claim reserved by the 3 November 2015 order, it is also barred by *res judicata*.

However, it is clear that the trial court in the first suit dismissed plaintiffs' claim arising out of Article 9 of the UCC, N.C. Gen. Stat. § 25-9-100, *et seq.*, for failure to make a commercially reasonable disposition of the collateral without prejudice. Therefore, plaintiffs' allegations that defendant failed to dispose or sell of the collateral in a commercially reasonable manner, including that defendant did not properly maintain the property to allow for a commercially reasonable sale, is not barred by *res judicata* and may proceed to trial. Because defendant's collateral estoppel argument requests the same conclusion we have reached based on the doctrine of r*es judicata*, we need not consider defendant's second argument on appeal.

We reverse the trial court's order to the extent it permitted plaintiffs to raise claims in addition to those arising out of Article 9 of the UCC, N.C. Gen. Stat. § 25-9-100, *et seq.*, for failure to make a commercially reasonable disposition of the collateral.

III. Conclusion

For the foregoing reasons, we reverse in part and affirm in part.

REVERSED IN PART; AFFIRMED IN PART.

Chief Judge McGEE and Judge INMAN concur.

SARAH ELIZABETH SFREDDO, Plaintiff
v.
JACOB MICHAEL HICKS, Defendant

No. COA18-1010

Filed 18 June 2019

1. Appeal and Error—timeliness of appeal—Rule 59 motion—tolling of time

In a dispute over the validity of a couple's separation agreement, the wife's appeal—from a final order the trial court incorrectly labelled an order of summary judgment, even though neither party moved for summary judgment and despite the fact that the court held a bench trial and made findings of fact—was timely where her Rule 59 motion stated a proper basis for a new trial and therefore tolled the time for giving notice of appeal.

2. Acknowledgments—separation agreement—presumption of regularity—rebuttal required

In a dispute over the validity of a couple's separation agreement, where the husband did not deny he signed the agreement in the presence of a notary and presented no evidence to rebut the presumption of regularity of the notarization, and where the wife's evidence, along with the agreement itself, supported that presumption, the trial court erred by determining the agreement was not properly acknowledged and therefore void.

Appeal by plaintiff from orders entered 12 December 2017 and 19 April 2018 by Judge Debra Sasser in District Court, Wake County. Heard in the Court of Appeals 27 March 2019.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, Andrea Bosquez-Porter and Zachary K. Dunn, for plaintiff-appellant.

Wake Family Law Group, by Helen M. O'Shaughnessy and Katherine Hardersen King, for defendant-appellee.

STROUD, Judge.

Plaintiff-wife appeals an order granting summary judgment and dismissing her complaint and order denying her Rule 59 motion. Although the trial court titled the order as a summary judgment order, because the trial court conducted a bench trial and entered a final order dismissing Wife's case based upon findings of fact and conclusions of law, we consider the order based upon its substance and not its title. Because defendant-husband made no allegation or showing that he and Wife did not actually sign the Agreement in the presence of the notary public and no showing of any other irregularity in the acknowledgement of the separation agreement by the notary public, Husband failed to rebut the presumption of regularity of the acknowledgement established by North Carolina General Statute § 10B-99. Both the Agreement itself and Wife's testimony indicated that the Agreement was properly acknowledged in the presence of the notary under North Carolina General Statute § 10B-3(1), so the trial court erred by finding that "[n]o evidence was presented that the separation agreement and property settlement was signed in the presence of the notary or that the parties acknowledged to the notary that they had signed the agreement" and concluding that the Agreement was "not a valid contract" because it was not properly acknowledged under North Carolina General Statute §§ 52-10 and 10B-3. We reverse and remand for further proceedings consistent with this opinion.

I. Background

In September of 2015, wife filed a complaint against husband for breach of contract, specific performance, and attorney's fees, alleging that he had failed to perform his obligations under a separation and property settlement agreement ("Agreement") between the two of them. On 5 November 2015, Husband filed his answer and affirmative defenses; he denied many of the factual allegations of the complaint and raised affirmative defenses as follows:

> As defenses to any claims Plaintiff may have, Defendant asserts the following affirmative defenses: estoppel, waiver, duress, unconscionability and unclean hands. In addition, the Separation Agreement that is the subject of Plaintiff's action is VOID because the agreement was not

properly acknowledged as required by N.C. Gen. Stat. § 52-10.1.[1]

On 23 May 2017, Husband filed a motion to dismiss for failure to prosecute, and the trial court denied the motion on or about 12 October 2017, noting that the Trial Court Administrator had set the case for trial on 25 October 2017.

On 25 October 2017, the case came on for hearing, and the trial court announced it would first consider Husband's motion to dismiss based upon the affirmative defense in his answer of a "procedural defect in the parties' separation[.]" Husband's attorney gave the trial court a copy of North Carolina General Statute § 52-10.1 regarding acknowledgment of separation agreements and presented Husband's argument regarding the defects in the acknowledgement of the Agreement. Husband's counsel argued that based upon the wording of the notarial certificate on the Agreement, "there was no indication that the notary has personal knowledge of the identity of the principal or that the notary acknowledged that the signature was the individual's signature."

Wife, who was representing herself, then began to present her argument, but the trial court placed her under oath to testify. The trial court then conducted a direct examination of Wife regarding the execution and acknowledgement of the Agreement. Husband's counsel had no questions and did not tender any evidence. The trial court then announced that the case would be treated "very much akin to a motion for summary judgment" and announced that it would grant summary judgment for Husband, dismissing the case. The trial court stated that Husband had "rebutted the presumption of the validity" of the acknowledgement and that Wife's "evidence wasn't sufficient to show me that all the prerequisites of the acknowledgement were met."

On 12 December 2017, the trial court entered its order which was entitled "ORDER FOR SUMMARY JUDGMENT[.]" The order stated that because the court was considering matters outside of the pleadings it was converting the hearing on the motion to dismiss to a summary judgment hearing, but it also made findings of fact and conclusions of law

1. "Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b). Such certifying officer must not be a party to the contract." N.C. Gen. Stat. § 52-10.1 (2017). A notary public is one of the certifying officers designated by North Carolina General Statute § 52-10. *See* N.C. Gen. Stat. § 52-10 (2017).

and granted summary judgment for Husband, dismissing Wife's complaint. On 28 December 2017, Wife filed a Rule 59 motion for amendment of the judgment or alternatively for a new trial. On 19 April 2018, the trial court denied the Rule 59 motion. On 18 May 2018, Wife appealed both the summary judgment and Rule 59 orders.

II. Timeliness of Appeal

[1] Husband contends this Court has no jurisdiction to review the summary judgment order because Wife's notice of appeal for the summary judgment order was not timely filed. But despite the title of the order, as explained further below, Wife actually appealed a final order on the merits, with findings of fact, entered after a bench trial. *See generally Edwards v. Edwards*, 42 N.C. App. 301, 307, 256 S.E.2d 728, 732 (1979) ("Examination of the record reveals, however, that although plaintiff moved for a summary judgment and the court at one point seemed to indicate that it was allowing the motion, what actually occurred was that the court heard the testimony of witnesses, who were subject to cross-examination by defendant's counsel, and after hearing this evidence and on the basis thereof, the court found the facts as required by G.S. 50-10. Thus, the judgment entered in this case was not a summary judgment but was one rendered by the court after making appropriate findings of fact.").

In this case, the analysis of the distinction between a summary judgment order and a final order following a bench trial is necessary to determine the applicability of Rule 59. *See generally Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, ___ N.C. App. ___, ___, 794 S.E.2d 535, 538 (2016) ("All of the enumerated grounds in Rule 59(a), and the concluding text addressing an action tried without a jury, indicate that this rule applies only after a trial on the merits or, at a minimum, a judgment ending a case on the merits." (quotation marks omitted)). Because this was a trial on the merits upon which a final judgment was entered, despite the title of the order and the trial court's intent to consider the case as "akin to a motion for summary judgment," Wife's Rule 59 motion tolled the time for appeal of the trial court's order dismissing her case. *See id.* N.C. R. App. P. 3(c) ("In civil actions and special proceedings, a party must file and serve a notice of appeal . . . within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or . . . if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of

entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).")

A. Type of Order on Appeal

This appeal is complicated by the trial court's *sua sponte* designation of the proceeding as a summary judgment hearing and by the order entered after the hearing designated as a summary judgment order, despite having conducted a bench trial taking live testimony, and making findings of fact. Since the trial court's standards for deciding the case, the applicability of Rule 59, and our standards of review are dictated by the substance of the motion under consideration and the type of hearing conducted, where the wrong title is assigned to the hearing and order, we still must consider the issues under the correct standards and law. *See generally Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (noting substance, not "labels," determines our review). We review an order based upon substance and not upon the label or title the trial court assigns to it. *See id.* The trial court conducted a bench trial, not a summary judgment hearing, and we make this determination based upon several factors: (1) Neither party had filed a motion for summary judgment and neither had filed any affidavits or other evidence which could support a ruling on summary judgment; (2) neither party expected or requested a summary judgment hearing; the trial court determined *sua sponte* to treat Husband's motion to dismiss as a summary judgment motion; and (3) the trial court made findings of fact, "and summary judgment presupposes that there are no triable issues of material fact." *Hodges v. Moore*, 205 N.C. App. 722, 723, 697 S.E.2d 406, 407 (2010) (citations and quotation marks omitted); *see also War Eagle, Inc. v. Belair*, 204 N.C. App. 548, 552, 694 S.E.2d 497, 500 (2010) ("By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings. We understand that a number of trial judges feel compelled to make findings of fact reciting those 'uncontested facts' that form the basis of their decision. When this is done, any findings should clearly be denominated as 'uncontested facts' and not as a resolution of contested facts. In the instant case, there was no statement that any of the findings were of 'uncontested facts.' ").

Although the trial court treated the case as if Husband had "rebutted the presumption of the validity" of the acknowledgement, he had not filed any affidavit or response sufficient to rebut the presumption but only denied validity of the Agreement in his answer:

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element

> of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. *If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so. If the moving party fails to meet his burden, summary judgment is improper regardless of whether the opponent responds.* The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial.
>
> If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. The non-moving party may not rest upon the mere allegations of his pleadings.
>
> *Subsection (e) of Rule 56 does not shift the burden of proof at the hearing on motion for summary judgment. The moving party still has the burden of proving that no genuine issue of material fact exists in the case.* However, when the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him. The opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists. However, subsection (e) of Rule 56 precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts.

Lowe v. Bradford, 305 N.C. 366, 369–70, 289 S.E.2d 363, 366 (1982) (emphasis added) (citations and quotation marks omitted).

Here, the trial court treated Husband as the "moving party" for purposes of summary judgment, but he never met his "burden of proving that no genuine issue of material fact exists in the case." *Id.* at 370, 289 S.E.2d at 366. Husband did not file an affidavit or present any evidence,

which is unsurprising since he did not move for summary judgment. Despite the lack of *any* showing from Husband that he may be entitled to summary judgment, the trial court reasoned that Husband had "rebutted" the presumption of regularity and required Wife to testify to present evidence in response to Husband's mere denial. In *Hill v. Durett*, Judge (now Justice) Davis noted the differences between a summary judgment hearing and a bench trial upon the substance of the hearing and order, despite confusion over the type of hearing before the trial court, noting,

> We take this opportunity to remind the bench and bar that summary judgments and trials are separate and distinct proceedings that apply in different circumstances under our Rules of Civil Procedure, and the meaningful distinctions that exist between them should not be blurred. While we recognize that family law cases under Chapter 50 often require the presiding judge to serve as the finder of fact, the North Carolina Rules of Civil Procedure remain applicable to such cases absent the existence of statutes establishing a different procedure.

___ N.C. App. ___, ___, ___S.E.2d ___, ___ (COA18-515) (March 19, 2019) (footnote omitted).

Even if the trial court, as it stated, was considering the matter as a motion for summary judgment, it should have considered Wife's testimony as true and construed it in the light most favorable to her, not to Husband. *Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 487, 764 S.E.2d 203, 210 (2014) ("Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the nonmoving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party." (citation and quotation marks omitted)). *Only* if there was no genuine issue of material fact based upon the view of Wife's evidence in the light most favorable to her, *see id.*, could Husband be entitled to judgment as a matter of law, assuming the law supported his position. *See Lowe*, 305 N.C. at 369–70, 289 S.E.2d at 366. Instead, here, the trial court made findings of fact considering Wife's testimony in the light most favorable to Husband.

The trial court found, "No evidence was presented that the separation agreement and property settlement was signed in the presence of the notary or that the parties acknowledged to the notary that they had signed the agreement." But the Agreement itself indicates that the parties signed in the presence of the notary, and Wife testified that she

and Husband signed in the presence of the notary. Since the hearing had "virtually all of the hallmarks" of a bench trial, we consider the trial court's order as a final judgment following a bench trial, despite its label from the trial court. *See Hill*, ___ N.C. App. at ___, ___ S.E.2d at ___.

B. Rule 59 Motion and Tolling of Time for Appeal

In addition, the Rule 59 motion must be a proper Rule 59 motion to toll the time for appeal. *See generally Batlle v. Sabates*, 198 N.C. App. 407, 413–14, 681 S.E.2d 788, 793–94 (2009). Wife moved for a new trial pursuant to Rule 59(a)(7) and (8) or for amendment of judgment under rule 59(e):

> If a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the 30–day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order.

As a result, the timeliness of Plaintiff's appeal from the 21 September 2007 order hinges upon whether Plaintiff's 5 October 2007 motion sufficiently invoked the provisions of N.C. Gen.Stat. § 1A–1, Rules 50(b), 52(b), or 59.

In analyzing the sufficiency of a motion made pursuant to N.C. Gen.Stat. § 1A–1, Rule 59, one should keep in mind that a failure to give the number of the rule under which a motion is made is not necessarily fatal, if the grounds for the motion and the relief sought is consistent with the Rules of Civil Procedure. As long as the face of the motion reveals, and the Clerk and the parties clearly understand, the relief sought and the grounds asserted and as long as an opponent is not prejudiced, a motion complies with the requirements of N.C. Gen.Stat. § 1A–1, Rule 7(b)(1). In other words, to satisfy the requirements of Rule 7(b)(1), the motion must supply information revealing the basis of the motion. However, while a request that the trial court reconsider its earlier decision "granting the sanction" may properly be treated as a Rule 59(e) motion," a motion made pursuant to N.C. Gen. Stat. § 1A–1, Rule 59, cannot be used as a means to reargue matters already argued or to put forward arguments which were not made but could have been made. Thus, in order to properly address the issues raised by Defendant's dismissal motion, we must examine the allegations in Plaintiff's motion to ascertain

> whether Plaintiff stated a valid basis for seeking to obtain relief pursuant to N.C. Gen. Stat. § 1A–1, Rule 59.

Id. (citations, quotation marks, brackets, and footnote omitted).

Thus, if at least one of the grounds asserted in Wife's Rule 59 motion is a proper basis for new trial under Rule 59, the motion tolls the time for appeal.

> N.C. Gen. Stat. Sec. 1A–1, Rule 59(a) sets forth the various grounds for a new trial. Rule 59(a)(8) permits a new trial for errors in law occurring at the trial and objected to by the party making the motion. The trial court's ground for the new trial — for errors committed by the Court — is an order under Rule 59(a)(8).
>
> Both a motion and an order for new trial filed under Rule 59(a)(8) have two basic requirements. First, the errors to which the trial judge refers must be specifically stated. Second, the moving party must have objected to the error which is assigned as the basis for the new trial. N.C. Gen. Stat. 1A–1, Rule 59(a)(8).

Barnett v. Security Ins. Co. of Hartford, 84 N.C. App. 376, 380, 352 S.E.2d 855, 858 (1987) (citations and quotation marks omitted).

Wife's motion noted that the trial court's order found that "[n]o evidence was presented that the separation agreement and property settlement was signed in the presence of the notary[.]" Wife's motion included quotes from a transcription of the testimony at the hearing, including her testimony about going before the notary, providing identification, and signing the Agreement. Wife's motion noted the trial court's comments at the hearing:

> Judge: I don't recall you saying that after she looked at the document that she had you all then sign it.
>
> Plaintiff: I did say that.
>
> Judge. You may have thought you said that. I don't recall you saying that. What I recall you saying was that she looked at the licenses she looked at the names on the document. And I said, well you know you can't tell me what she looked at, but that's what you said. And I don't recall you saying that after that's when you signed the documents. I don't remember that testimony at all.

(Quotation marks omitted.)

But the transcript shows that Wife *did* testify that they signed the document after the notary looked at their licenses; the trial court's recollection was incorrect. Of course, at the initial hearing, the trial court did not have the benefit of a transcript. In Wife's Rule 59 motion, Wife noted why the evidence was insufficient to support the trial court's finding there was "[n]o evidence" of signing before the notary, including the transcription of testimony, and the error of law in application of North Carolina General Statute § 10B-3 to the Agreement. Wife preserved these arguments before the trial court because she noted both her testimony and the correct law, as stated in *Moore v. Moore*, 108 N.C. App. 656, 424 S.E.2d 673, *aff'd per curiam*, 334 N.C. 684, 435 S.E.2d 71 (1993), at the hearing. Wife's appeal was timely, since the order dismissing Wife's complaint was a final order from a bench trial which resolved all issues, and her Rule 59 motion was a proper motion which tolled the time for her appeal.[2]

Wife filed her notice of appeal of both orders within thirty days of the trial court's order denying her Rule 59 motion, so her appeal of both orders is timely. *See id.*

III. Acknowledgment of Agreement

[2] Due to the erroneous label by the trial court as a summary judgment order, Wife's brief substantively focuses on the law regarding acknowledgement of the Agreement and why summary judgment dismissing the case was inappropriate. Husband's brief focuses only on the timeliness of the appeal. Husband notes that he "believes that [Wife's] analysis regarding summary judgment is correct" but argues only that "a motion under Rule 59 was not the appropriate way for [Wife] to challenge the order granting summary judgment." Thus Husband tacitly concedes that the trial court's interpretation of the law regarding the acknowledgment of the Agreement was in error. Therefore, the central legal issue presented is whether the trial court erred in concluding the Agreement was void based upon lack of proper acknowledgement under North Carolina General Statute §§ 52-10 and 10B-3.

A. Standard of Review

Because the order on appeal is a final order from a bench trial, despite its label as a summary judgment order, our standard of review

2. In the hearing on the Rule 59 motion, the trial court did not consider Wife's substantive argument but denied the Rule 59 motion solely because the judgment "ended the case at the summary judgment state and not after a trial or a verdict" and Rule 59 "does not grant relief for summary judgment[.]"

> [i]n a bench trial in which the . . . court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable de novo.

Hinnant v. Philips, 184 N.C. App. 241, 245, 645 S.E.2d 867, 870 (2007) (citation, quotation marks, and ellipses omitted). The finding of fact challenged here is "[n]o evidence was presented that the separation agreement and property settlement was signed in the presence of the notary or that the parties acknowledged to the notary that they had signed the agreement." The challenged conclusion of law is that "[t]he Separation Agreement and Property Settlement is not a valid contract because it was not properly acknowledged."

B. Presumption of Regularity of Notarial Acts

We first note the cases and statutes governing notarial acts[3] and the presumption of regularity of notarial acts:

> In the absence of evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation, we recognize a presumption of regularity to notarial acts. N.C. Gen. Stat. § 10B–99 (2013). This presumption of regularity allows notarial acts to be upheld, provided there has been substantial compliance with the law. N.C. Gen. Stat. § 10B–99. Thus, the presumption of regularity acts to impute a substantial compliance component to notarial acts, including the administration of oaths.

In re Adoption of Baby Boy, 233 N.C. App. 493, 499–505, 757 S.E.2d 343, 347-50 (2014) (quotation marks omitted) (determining there was statutory compliance with administration of an oath where "[t]he notary was physically present when the oath was administered, aware of the circumstances, and thereby implicitly assented to its administration, which was done in her name. By these facts, it sufficiently appears that the administration of the oath was the act of the notary."). As there was

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3. "Notarial act, notary act, and notarization. -- The act of taking an acknowledgment, taking a verification or proof or administering an oath or affirmation that a notary is empowered to perform under G.S. 10B-20(a)." N.C. Gen. Stat. § 10B-3(11) (2017).

no "evidence of fraud on the part of the notary, or evidence of a knowing and deliberate violation" and Husband never claimed that he did not sign the Agreement in the present of the notary, the Agreement itself should at the very least been accorded a presumption of regularity, and this would preclude the dismissal of Wife's complaint. *Id.*

North Carolina General Statute § 10B-3 sets forth the definitions applicable to Chapter 10B. *See* N.C. Gen. Stat. § 10B-3 (2017). An "acknowledgment" is defined as:

> A notarial act in which a notary certifies that at a single time and place all of the following occurred:
>
> a. An individual appeared in person before the notary and presented a record.
>
> b. The individual was personally known to the notary or identified by the notary through satisfactory evidence.
>
> c. The individual did either of the following:
>
> i. Indicated to the notary that the signature on the record was the individual's signature.
>
> ii. Signed the record while in the physical presence of the notary and while being personally observed signing the record by the notary.

N.C. Gen. Stat. § 10B-3(1). The portion of the document in question here is the "notarial certificate" or "certificate," defined as

> [t]he portion of a notarized record that is completed by the notary, bears the notary's signature and seal, and states the facts attested by the notary in a particular notarization.

N.C. Gen. Stat. § 10B-3(12).

Before the trial court, Husband's attorney argued that the notarial certificate was not proper because North Carolina General Statute § 10B-3 "section C2 has been satisfied, but I would say C1 and B have not been satisfied." Husband did not challenge the acknowledgment under § 10B-3(1)(a), "[a]n individual appeared in person before the notary and presented a record[;]" his counsel stated, "[a]rguably, that's occurred." N.C. Gen. Stat. § 10B-3(1)(a). Thus, Husband's argument was that the certificate failed because it did not show (1) Husband and Wife were "personally known to the notary or identified by the notary through satisfactory evidence[;]" and (2) they "[i]ndicated to the notary that the signature[s] on the record [were their] . . . signature[s]."

Here, the certificate on the Agreement reads,

> IN WITNESS WHEREOF, the parties have signed, sealed and acknowledged this Agreement in duplicate originals, one of which is retained by each of the parties hereto.
>
> [Husband's signature] JACOB MICHAEL HICKS (Husband)
>
> Sworn to and subscribed to before me, this the 14 day of May, 2009. [Notary seal.]
>
> [Signature of Monica R. Livingston in cursive and print]
>
> (Notary Public)
>
> My commission expires: Nov. 29, 2010

The quoted portion is repeated verbatim again with the Wife's name and signature.

We first note that North Carolina General Statute § 10B-3(1)(c) requires that the person signing the document must *either* "indicate[ ] to the notary that the signature on the record was the individual's signature" *or* "sign[] the record while in the physical presence of the notary and while being personally observed signing the record by the notary." N.C. Gen. Stat. § 10B-3(1)(c). In other words, there is no requirement to satisfy *both* "C2" and "C1" as Husband's counsel seemed to contend. Husband conceded that the parties had signed in the presence of the notary, satisfying subsection (c)(2), so there was no need for the acknowledgement to comply with subsection (c)(1) as well. *See* N.C. Gen. Stat. § 10B-3(c). Thus, despite Husband's counsel's statements, the only portion of the acknowledgement challenged by Husband was "B" that "[t]he individual was personally known to the notary or identified by the notary through satisfactory evidence." N.C. Gen. Stat. § 10B-3(1)(b).

The notarial certificate does not include as much detail or the exact wording as some commonly used forms, but it includes the substance required by North Carolina General Statute § 10B-3.[4] *See id.* The notary certified that the agreement was "sworn to and subscribed to before me" by the "parties," who were identified in the Agreement as Husband and Wife, on 14 May 2009. To "[s]ubscribe" the Agreement means to sign it. See Black's Law Dictionary 1655 (10th ed. 2009) (defining "subscribe" as "[t]o write (one's name) underneath; to put (one's signature) on a document").

4. The hearing transcript reflects that Husband's counsel presented the forms as used in her law office to the trial court as examples of proper certificates, but those forms are not in our record.

"[B]efore me" means that the parties signed in the presence of the notary. Further, any minor omissions or issues in the wording of a certificate are covered by North Carolina General Statute § 10B-40(a1)(1). "By making or giving a notarial certificate, *whether or not stated in the certificate*, a notary certifies . . . [a]s to an acknowledgment, *all those things described in G.S. 10B-3(1)*." N.C. Gen. Stat. §10B-40(a1)(1) (2017) (emphasis added). Based upon the certificate on the Agreement alone, the trial court erred in determining that the acknowledgement of the Agreement was not sufficient since it failed to consider the statutory presumption of regularity, especially since Husband never made any factual allegations of irregularity to rebut the presumption of regularity or contended the signature on the Agreement was not his. While Husband's answer included as an affirmative defense the allegation that the Agreement was void because it "was not properly acknowledged as required by NCGS 52-10.1[;]"he did not deny that he signed the Agreement before the notary or make any factual allegations about his claimed defect in the acknowledgement.

Despite Husband's failure to present any evidence to rebut the presumption of regularity of the acknowledgment, the trial court then called Wife to testify about the signing of the Agreement. Answering the trial court's questions, Wife testified:

> A. We came into the bank. We had to sit down for a couple of minutes. She called us up. She asked why we were there, got the information. She asked for both of our identifications.
>
> She looked through the document.
>
> . . . .
>
> A. Unh-hunh. And she asked for both of us to submit our licenses to her. She might have made a copy of those, but she compared those to --
>
> Q. (Interposing) Ma'am, you can't tell me what you think she did.
>
> A. OK. OK. She compared those to--
>
> Q. (Interposing) You can't tell me what you think she did.
>
> A. I know that she compared those to what--
>
> Q. (Interposing) How do you know that, ma'am?

A. Well, she looked at the document, and she looked at our licenses, and she looked at what the names were in the contract.

Q. Ma'am, you can't tell me what she looked at.

A. Oh. OK.

Q. I mean, you can assume, but I can't take your assumptions.

A. Well, she looked our licenses and made sure that they were us.

Q. Ma'am, I don't know that I can even take that testimony.[5]

A. OK.

Q. You definitely can tell me that she asked for your licenses and you gave them to her.

A. OK. She asked for our licenses, and we gave them to her.

Q. And you can't tell me what she did with–you can't tell me what she said. If she said what she was doing. You can't tell me what you assume she was doing.

A. OK. She did ask for our licenses, and we gave them to her.

Q. OK. And anything else?

A. *We had to sign.*

(Emphasis added). In summary, Wife testified that she and Husband went to a bank, presented their drivers licenses and the Agreement to the notary, and signed the Agreement after the notary had taken their

5. North Carolina General Statute § 10B-3(16) defines "[p]ersonal appearance and appear in person before a notary" as "[a]n individual and a notary are in close physical proximity to one another so that they may freely see and communicate with one another and exchange records back and forth during the notarization process." N.C. Gen. Stat. § 10B-3(16). North Carolina General Statute § 10B-3(22) defines "[s]atisfactory evidence" as "[i]dentification of an individual based on either of the following: a. At least one current document issued by a federal, state, or federal or state-recognized tribal government agency bearing the photographic image of the individual's face and either the signature or a physical description of the individual." N.C. Gen. Stat. § 10B-3(22). Wife's testimony shows that she and Husband "appear[e]d in person" before the notary, provided their drivers licenses as "[s]atisfactory evidence" of their identities and signed the Agreement. N.C. Gen. Stat. § 10B-3(16), (22).

licenses. Despite this evidence, the trial court found that "No evidence was presented that the separation agreement and property settlement was signed in the presence of the notary or that the parties acknowledged to the notary that they had signed the agreement" even though Husband did not contest that they had signed in the presence of the notary. Further, the certificate itself stated that the parties had "subscribed" the Agreement "before" the notary.

And even if we were to treat the matter as a summary judgment motion, the result would be the same, based upon *Moore*. In Wife's argument before the trial court, Wife noted *Moore*, which held that the plaintiff husband had failed to rebut the presumption of regularity of the acknowledgment of a separation agreement despite his affidavit claiming that the notary was not in the room the entire time the documents were being signed:

> Plaintiff has failed to advance a genuine issue of material fact which would justify going forward with a trial on the issue of the validity of the separation agreement.
>
> Plaintiff's evidence does not overcome the presumption of legality of execution created by the notarization of the separation agreement. North Carolina recognizes a presumption in favor of the legality of an acknowledgment of a written instrument by a certifying officer. *To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred.* In *Skinner*, for example, the defendant challenged the plaintiff's verification of his Rule 11 complaint. This Court stated:
>
> > There was no showing that plaintiff did not in fact sign the verification, and nothing in the record suggests that the signature which appears thereon was not in fact his signature. The certificate to the verification signed by the notary public and attested by her seal certifies that the verification was sworn to and subscribed" before her, and nothing in the record impeaches that certification.
>
> *Here, plaintiff never asserts that the actual signature on the agreement is other than his own-he suggests only a technical violation of N.C.Gen.Stat. § 52-10.1. He does not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment.*

Moore, 108 N.C. App. at 658–59, 424 S.E.2d at 675 (emphasis added) (citations, quotations, and brackets omitted).

The trial court determined *Moore* did not support Wife's contentions, interjecting, "Well, let's stop for a second. That's talking about *Plaintiff's* evidence, alright?" (Emphasis added.) But in *Moore*, the legal positions of the parties and their titles as parties were opposite this case: the *plaintiff* was the "moving party" seeking to set aside the agreement based upon a defect in the acknowledgment of the separation agreement, just as *defendant* is in this case. *See id.* at 657, 424 S.E.2d at 674 ("Plaintiff-husband, William J. Moore, originally filed a declaratory judgment action on 18 June 1987 to have a separation agreement entered into with defendant-wife, Betty Evans Moore, declared null and void on the grounds that the agreement had not been properly acknowledged in violation of the requirements of N.C. Gen. Stat. § 52-10.1 and N.C. Gen. Stat. § 52-10(b). *Plaintiff claims the agreement violated these statutory provisions because a notary public did not witness him sign the agreement, nor did plaintiff acknowledge his signature to the notary.* Defendant denied the invalidity of the agreement and raised affirmative defenses of estoppel, waiver, and ratification. Defendant counterclaimed for specific performance of the agreement." (Emphasis added)). Thus, Wife was correct that *Moore* supported her argument: "[Husband's] evidence does not overcome the presumption of legality of execution created by the notarization of the separation agreement[,]" *id.* at 659, 424 S.E.2d at 675, because Husband presented no affidavit and no evidence to rebut the presumption. There was no showing that Husband did not sign the agreement, and nothing in the record suggests that the signature which appears on the agreement was not in fact his signature. The certificate to the verification signed by the notary public and attested by her seal certifies that the verification was "[s]worn to and subscribed to before" her, and nothing in the record impeaches that certification. Even considering the issue as a summary judgment motion, the trial court should have denied Husband's motion based upon his failure to rebut the presumption of regularity. *See id.* at 658–59, 424 S.E.2d at 675.

Because Husband presented no evidence to rebut the regularity of the notarization of the Agreement, and Wife's evidence, particularly the Agreement itself, supported the presumption of regularity of the notarization, the trial court erred in concluding as a matter of law that the Agreement was void because it was not properly acknowledged. We therefore reverse the trial court's order dismissing Wife's claims based upon the Agreement for this reason.

IV. Conclusion

Because we are reversing the order allowing Husband's motion to dismiss, we need not address Wife's argument regarding the denial of

her Rule 59 motion. The order is reversed and we remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges INMAN and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JEFFERY JAMAR BARRETT

No. COA19-79

Filed 18 June 2019

Evidence—reliability—McLeod factors—evidence found by tracking dog

In a prosecution for common law robbery, the trial court properly admitted evidence found by a tracking dog at the crime scene because the four-factor test from *State v. McLeod*, 196 N.C. 542 (1929), for establishing the tracking dog's reliability was met where—despite the absence of evidence showing that the dog was of pure blood—a police officer's sworn testimony established the dog's training, experience, and tracking abilities, which in turn corroborated other overwhelming evidence of Defendant's guilt.

Appeal by defendant from judgment entered by Judge Stanley L. Allen in Guilford County Superior Court. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Sage A. Boyd, for the State.

James R. Parish for defendant-appellant.

TYSON, Judge.

Jeffery Jamar Barrett ("Defendant") appeals from a judgment entered following a jury's conviction for one count of common law robbery. We affirm the lower court's decision and find no error.

I. Background

A man entered into a Taco Bell restaurant located on Battleground Avenue in Greensboro and stole cash from the register on 8 February 2015. Greensboro police officers used Carlo, a trained tracking dog, to follow the thief's scent. Officer McNeal, the dog's handler at the time, testified to Carlo's 2,000 hours of training and to Carlo's more than 1,000 deployment searches.

Officer Douglas responded to the robbery by establishing a perimeter and looking for suspects. Officer McNeal and Carlo located a sweatshirt, a toboggan, gloves, and two bank bags. He observed Defendant walking down the street within the perimeter. Officer Douglas stopped Defendant, patted him down for weapons, and noticed copious amounts of cash in his pockets that was organized by its face value.

Officer Rodriguez collected the evidence, photographed the items found by Carlo, and took a swab of Defendant's DNA. Greensboro police officers sent the evidence and the DNA swab to the North Carolina State Crime Laboratory.

A forensic scientist at the crime lab generated a DNA profile from the swab and compared it to DNA found on the recovered items. She concluded that the DNA profile on the glove was consistent with two individuals and that Defendant could not be excluded as a contributor to the multiple major profiles.

Defendant also made a phone call while in custody, which Detective Tyndall subsequently reviewed. Defendant recalled the circumstances of his arrest for robbery on 8 February 2015 and discussed the shoes he had worn during the incident.

A jury convicted Defendant and returned a verdict of guilty to one count of common law robbery. He was sentenced to a minimum of fourteen months and a maximum of twenty-six months imprisonment. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Standard of Review

A trial court's determination of an expert witness's qualifications and admission of testimony is reviewed for abuse of discretion. *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000).

IV. Issues

Defendant argues the trial court erred in allowing the introduction and admission of evidence found by a tracking dog.

V. Analysis

Ninety years ago, the Supreme Court of North Carolina laid out a four-factor test to establish reliability of a tracking dog in *State v. McLeod*:

> the action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience [to be] reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

State v. McLeod, 196 N.C. 542, 545, 146 S.E. 409, 411 (1929) (citations omitted).

Over time, certain elements stated in this standard rule have changed. The current analysis demonstrates "a decreasing emphasis on the requirement that the tracking dog be a pure blood bloodhound" in the first element of the test, "yet [it] continue[s] to require the dog to have training, experience, and proven ability in tracking." *State v. Green*, 76 N.C. App. 642, 645, 334 S.E.2d 263, 265 (1985).

In *State v. Rowland*, 263 N.C. 353, 139 S.E.2d 661 (1965), a police officer arrived with a tracking dog at the scene of a robbery. The dog followed a trail which led to the perpetrator of the crime. *Id.* at 355, 139 S.E.2d at 663. The defendant alleged the State failed to identify the dog as a purebred hound. *Id.* at 359, 139 S.E.2d at 665. The court held the dog had pedigreed himself through his abilities to track and find evidence, despite the State's failure to meet the first requisite of the *McLeod* four-factor test. *Id.* at 360, 139 S.E.2d at 666.

The Supreme Court decided "the conduct of the hound and other attendant circumstances, rather than the dog's family tree" are factors to the admissibility of the evidence. *Id.* at 359, 139 S.E.2d at 665. The evidence a tracking dog finds on the trail may be admitted, "*if* [the dog] is

shown to be naturally capable of following the human scent" and "*if* the evidence is corroborative of other evidence tending to show defendant's guilt." *Id.* (emphasis in original). *See also Green*, 76 N.C. App. 642, 334 S.E.2d 265 (upholding a defendant's conviction where a tracking dog has identified the perpetrator).

A. *Type of Hound*

Defendant objects to the use of the evidence found by Carlo because "[t]here was never any testimony as to what kind of dog Carlo was." Defendant asserts the State failed to lay a proper foundation for the "testimony of the 'expert' dog Carlo." However, Officer McNeal established that during the February robbery incident he responded and deployed a tracking dog. A tracking dog "looks for disturbance[s]" and has been "trained . . . to detect specific odors" including "human odors."

The 1929 *McLeod* test has been modified over time and courts have recently placed less emphasis on the breed of the dog and placed more emphasis on the dog's ability and training. Although the State failed to identify Carlo's breed and never proffered any evidence that Carlo was "of pure blood," the officer's sworn testimony elaborated on Carlo's training and ability which corroborated other evidence that tended to show Defendant's guilt. *See Rowland*, 263 N.C. at 359, 139 S.E.2d at 665; *McLeod*, 196 N.C. at 545, 146 S.E. at 411.

B. *Training and Experience*

Officer McNeal testified to Carlo's "training, experience and proven ability in tracking." *Green*, 76 N.C. App. at 645, 334 S.E.2d at 265. Officer McNeal explained that Carlo had received training locally and elaborated on the training process. He said the tracking dogs, including Carlo,

> are trained to differentiate in disturbances in the environment, such as broken grass blades, rocks that are kicked over. All of that creates an odor for the dog. In conjunction with skin cells and other odors that are falling off the person, the dog is trained to track that from the point where it starts to wherever the point of the odor is.

Officer McNeal testified Carlo had "probably more than 2,000 hours of training since [he] worked [with] him." Carlo alerts by "lay[ing] down over top of the article with the article between his two front paws with his nose as close to the object as he can." Carlo is certified annually by the International Police Work Dog Association to demonstrate "his proficiency" in detecting human odors on inanimate objects.

C. *Proven Ability*

Officer McNeal also explained that the tracking dogs work city-wide to respond to situations which require evidence to be located. Carlo had conducted over a thousand searches since he began working with Officer McNeal. During the 8 February 2015 robbery incident, Officer McNeal deployed the tracking dog to look for a disturbance in the area.

During this deployment, Carlo tracked from the back side of the Taco Bell to an old Sears Distribution Center parking lot where he discovered a sweatshirt, toboggan, gloves and two bank bags. Carlo alerted Officer McNeal that he smelled "recent human odor" and laid down over top of the sweatshirt, toboggan, and gloves with the articles between his front paws and his nose close to the articles, as he had been trained to do.

This testimony demonstrates Carlo had been sufficiently trained, had the appropriate ability to perform these tasks and had properly responded as trained. The trial court admitted the evidence, over objection, ruling that the proper foundation had been laid for the police tracking dog's training and reliability.

D. *Corroborating Evidence*

The State also introduced evidence which corroborated Defendant's guilt. Officer Douglas apprehended Defendant within the established perimeter from the site of the robbery. Defendant's pockets were "stuck open" with wads of cash and his clothing matched the 911 caller's description of the thief.

Defendant made a phone call in jail that indicated to Detective Tyndall the correct suspect had been apprehended. Defendant remarked on the circumstances of his arrest and described gray-green shoes he had worn during the robbery. The detective testified that the shoes Defendant described had been collected at the police station during the booking process. Defendant also stated on the telephone call, "I done thrown it away again . . . the same way I did when I went to Leesville, Louisiana." Defendant had been previously arrested and served a prison sentence for robbery in Leesville, Louisiana. Evidence and testimony presented at trial corroborated the results of Carlo's tracking.

Presuming *arguendo*, the trial court had erred in admitting testimony about the tracking dog's actions and the items found, the attendant circumstances and corroborating evidence presented at trial supported the jury's verdict finding Defendant guilty as the perpetrator.

The State presented other overwhelming evidence of Defendant's guilt. Any asserted error would be harmless.

VI. Conclusion

The State laid a proper foundation for admission into evidence the actions and results by Carlo, the tracking dog. Defendant has failed to show the trial court abused its discretion by admitting the evidence found by Carlo for the jury to consider.

Defendant received a fair trial, free from prejudicial error. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
TANYA O. CABBAGESTALK, DEFENDANT

No. COA18-1267

Filed 18 June 2019

Search and Seizure—traffic stop—reasonable suspicion—no signs of impairment—no violation of traffic laws

A police officer lacked reasonable suspicion to stop defendant's car where he had seen defendant drinking beer earlier in the night, he subsequently saw her purchase a beer at a gas station and then get into her car, he did not observe any signs of impairment, and he did not observe any violation of traffic laws. The error in denying defendant's motion to suppress amounted to plain error because, without the evidence from the traffic stop, there would have been no evidence of criminal conduct.

Appeal by defendant from judgment entered on 11 April 2018 by Judge Claire V. Hill in Robeson County Superior Court. Heard in the Court of Appeals on 25 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General James D. Concepción, for the State.

Warren D. Hynson for Defendant-Appellant.

BROOK, Judge.

Tanya O. Cabbagestalk ("Defendant") appeals from the trial court's judgment entered following a jury trial. Defendant argues the trial court erred in denying her motion to suppress, because the police officer who stopped Defendant's car lacked reasonable suspicion. We agree. We therefore reverse the trial court's judgment.

I. Background

A. Procedural History

On 20 January 2017, Hoke County Sheriff's Officer Perry Thompson ("Officer Thompson"), who was then a sergeant with the Rowland Police Department, stopped Defendant and charged her with driving while impaired ("D.W.I.") in violation of N.C. Gen. Stat. § 20-138.1. In a bench trial held on 22 September 2017 in Robeson County District Court, the Honorable William J. Moore found Defendant guilty of driving while impaired. Following judgment entered in the district court, Defendant gave notice of appeal in open court for a trial *de novo* in the Robeson County Superior Court.

On 28 March 2018, Defendant filed a motion to suppress in Robeson County Superior Court. On 10 April 2018, the Honorable Claire V. Hill conducted an evidentiary hearing in open court without a jury, and heard arguments from the State and Defendant on Defendant's motion to suppress. Officer Thompson provided the sole testimony at the hearing.

Following the trial court's denial of the motion to suppress, the Honorable Gale M. Adams presided over a jury trial during the criminal session of the Robeson County Superior Court. Officer Thompson was again the State's sole witness at trial. Defense counsel did not object to the disputed evidence. Defendant moved to dismiss at the close of the State's evidence, which the trial court denied. The jury found Defendant guilty of driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1. Judge Adams imposed a Level Four punishment, sentencing Defendant to 120 days imprisonment, suspended upon 12 months of supervised probation, and ordering Defendant to complete 48 hours of community service and to complete a substance abuse program. She was also ordered to pay a community service fee of $250, and her license was revoked.

Based on the prior motion to suppress that was filed and on the judgment entered, Defendant gave notice of appeal in open court. Defendant

further expressly argued in her appellate brief that the denial of the motion to suppress constituted plain error.

B. Factual Background

On 20 January 2018, at "[a]pproximately" 9:00 p.m., Officer Thompson was on "routine patrol" with the Rowland Police Department when he observed Defendant "sitting on the porch" of a local residence where "everyone hangs out at," drinking a "Natural Ice . . . tall can" of beer. He had known Defendant for "approximately two years," because he had previously stopped her for driving while her license was revoked, and for an open container violation. Officer Thompson was confident it was the Defendant he observed that evening drinking beer on the porch, based on prior interactions. Although it was night, he could see her because a porch light and a street light were illuminating the area, and he was only approximately ten feet away.

During the suppression hearing, Officer Thompson testified that he saw Defendant at the BP store in Rowland "maybe 30 minutes to an hour later." Upon reviewing the citation he issued on cross-examination, however, he clarified that the citation reflected a stop time of "at or about 11:00 p.m." On redirect he confirmed that he saw her drinking at 9:00 p.m. and saw her an hour and a half later at the gas station, "[b]uying more beer."

At the BP store, Defendant went to the beer cooler, purchased another beer, paid for it, and returned to her vehicle. Prior to being placed in a brown bag, the beverage in her hand looked to Officer Thompson like a "Natural Ice, the Ice." Officer Thompson admitted that he did not observe Defendant stumbling or otherwise walking as though she was intoxicated. Moreover, Officer Thompson did not speak to Defendant at this point, or any point prior to the traffic stop.

When Defendant got back into her truck and left the gas station, Officer Thompson followed her. Defendant "took East Main Street all the way up to North MLK Street, and she made a right turn on North MLK Street." Officer Thompson admitted that Defendant drove "normal[ly]"; that is, she was not speeding, going too slowly, weaving, or swerving. Defendant also appeared to be wearing her seatbelt, and her lights were working. Officer Thompson did not observe Defendant drinking the beer she had purchased or violate any traffic laws, nor did he run her plates before stopping her.

After following her for two to three blocks, Officer Thompson activated his blue lights as Defendant turned right on North MLK Street.

Defendant pulled off to the side of the road without incident. Officer Thompson stated, "I stopped her because earlier that night I observed her drinking a beer. She went back in the store, bought more beer, and then decided to get under the wheel and drive."

During the stop, Officer Thompson noticed a "strong odor of alcohol" on Defendant's breath, which he continued to smell once Defendant was in the officer's patrol car. Defendant admitted she had been drinking and discussed "family problems." Officer Thompson saw an unopened beer in Defendant's car. He continued his investigation at that point, performing two roadside breath tests, obtaining further information about Defendant's driver's license, and writing the ticket—a process which "[took] 15 to 20 minutes."

Officer Thompson subsequently transported Defendant to the Robeson County Jail. Once at the jail, he performed another breath test with two separate "blows," the lowest reading of which was a 0.16, twice as high as the legal limit of 0.08. Following the testing, Officer Thompson completed a Driving While Impaired Report, and took Defendant before a magistrate to be charged.

II. Analysis

On appeal, Defendant argues the trial court lacked support for a necessary finding of fact and erred in denying her motion to suppress the evidence obtained by Officer Thompson as a result of the vehicle stop. Defendant further argues that such denial constituted plain error as, without Officer Thompson's testimony, the evidentiary basis for the jury's verdict would have been insufficient. We agree.

A. Standard of Review

Following a hearing on a motion to suppress, a trial judge "must set forth in the record [her] findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2017). "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citation omitted). "This deference, however, is not without limitation. A reviewing court has the duty to ensure that a judicial officer does not abdicate his or her duty by merely ratifying the bare conclusions of affiants." *State v. Brown*, 248 N.C. App. 72, 74, 787 S.E.2d 81, 84 (2016) (internal marks and citation omitted).

"In reviewing a trial judge's ruling on a suppression motion, we determine only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Brewington*, 170 N.C. App. 264, 271, 612 S.E.2d 648, 653 (2005) (citation omitted). If the findings are supported by competent evidence, they are conclusive on appeal. *State v. Campbell*, 359 N.C. 644, 661, 617 S.E.2d 1, 12 (2005).

> Conclusions of law are reviewed *de novo* and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Crandell, 247 N.C. App. 771, 774, 786 S.E.2d 789, 792 (2016) (one italics added) (quoting *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted)).

A pretrial motion to suppress is insufficient to preserve for appeal the admissibility of evidence. *State v. Grooms*, 353 N.C. 50, 65-66, 540 S.E.2d 713, 723 (2000). Our Supreme Court has held, however, that "to the extent [a] defendant fail[s] to preserve issues relating to [his] motion to suppress, we review for plain error" if the defendant "specifically and distinctly assign[s] plain error" on appeal. *State v. Waring*, 364 N.C. 443, 468, 508, 701 S.E.2d 615, 632, 656 (2010), *cert. denied*, 565 U.S. 832, 132 S. Ct. 132, 181 L. Ed.2d. 53 (2011). For error to constitute plain error, a defendant must

> demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

B. Motion to Suppress

Defendant first challenges the trial court's finding that she was seen drinking 30 to 60 minutes before driving. Relatedly, Defendant also challenges the trial court's denial of her motion to suppress the evidence obtained through Officer Thompson's traffic stop of her vehicle. She argues that Officer Thompson did not have a reasonable, articulable suspicion to stop Defendant, and thus it was error to admit evidence resulting from the stop. Finally, Defendant argues that the trial court's

denial of the motion to suppress constituted plain error as it had a probable impact on the jury's guilty verdict. We agree with Defendant in each instance.

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. The North Carolina Constitution affords similar protection. N.C. Const. art. I, § 20. "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008), *cert. denied*, 555 U.S. 914, 129 S. Ct. 264, 172 L. Ed.2d 198 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396, 59 L. Ed.2d 660, 667 (1979)). "Such stops have 'been historically viewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968).' " *Id.*, 658 S.E.2d at 645 (quoting *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3rd Cir. 2006)). "[A] traffic stop is constitutional if the officer has a 'reasonable, articulable suspicion that criminal activity is afoot.' " *Id.* at 246-47, 658 S.E.2d at 645 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675, 145 L. Ed.2d 570, 576 (2000)). This reasonable suspicion must derive from more than an "inchoate and unparticularized suspicion or 'hunch[.]' " *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed.2d at 909.

In North Carolina, "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008).

> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required. This Court has determined that a reasonable suspicion standard requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists.

Barnard, 362 N.C. at 247, 658 S.E.2d at 645 (citations, quotation marks, brackets, and ellipsis omitted).

Though not always reducible to a mechanically applied formula, case law provides useful guidance in ascertaining what constitutes

reasonable suspicion of criminal activity justifying a traffic stop. "To be sure, when a defendant does in fact commit a traffic violation, it is constitutional for the police to pull the defendant over." *State v. Johnson*, 370 N.C. 32, 38, 803 S.E.2d 137, 141 (2017). "But while an actual violation is sufficient, it is not necessary." *Id.* at 38, 803 S.E.2d at 141. The following circumstances have supported finding a reasonable suspicion of criminal activity even absent showing a traffic violation:

- Defendant constantly weaved within lane for three-quarters of a mile at 11:00 p.m. *State v. Otto*, 366 N.C. 134, 138, 726 S.E.2d 824, 828 (2012).
- Tipster anonymously complained about intoxicated person driving black, four-door Hyundai and defendant drove car matching that description 20 m.p.h. in 35 m.p.h. zone, stopped at intersection without stop sign or light for "longer than usual," continued to travel "well below" speed limit, stopped at train crossing for 15-20 seconds with no train coming, failed to pull over for approximately two minutes after officer turned on blue lights, and passed several safe places to pull over before defendant stopped his car in middle of the street. *State v. Mangum*, ___ N.C. App. ___, 795 S.E.2d 106, 109-110 (2016).
- Defendant followed exact pattern for purchasing drugs (previously observed by police officer) by driving into area adjacent to building and leaving two minutes later. *State v. Crandell*, ___ N.C. App. ___, 786 S.E.2d 789, 796 (2016).

However, when the basis for an officer's suspicion connects only tenuously with the criminal behavior suspected, if at all, courts have not found the requisite reasonable suspicion. *See Brown v. Texas*, 443 U.S. 47, 48-49, 99 S. Ct. 2637, 2639, 61 L. Ed.2d 357, 360 (1979) (stop invalidated when based on officer observing defendant and another man "walking in opposite direction away from one another in an alley" in a neighborhood with "a high incidence of drug traffic"); *State v. Brown*, 217 N.C. App. 566, 572-73, 720 S.E.2d 446, 451 (2011), *review denied*, 365 N.C. 562, 742 S.E.2d 187 (2012) (stop invalidated when based on officer seeing car pull off to side of road approximately four hours after nearby unsolved robbery, hearing yelling and car doors slamming, and observing car rapidly accelerating but without violating traffic laws); *State v. Murray*, 192 N.C. App. 684, 666 S.E.2d 205 (2008) (stop invalidated

when based on officer observing motorist driving car consistent with traffic law and in a normal fashion at 3:41 a.m. in a high-crime area).

Here, Defendant argues first that the competent evidence does not support the trial court's Findings of Fact 5 in its order denying her motion to suppress. More specifically, Defendant challenges the underlined portion of Finding of Fact 5:

> 5. Sgt. Thompson was on routine patrol and saw the defendant drinking a tall can of beer on the porch of a house (where people would hang out) approximately 30 minutes to an hour before the time of the traffic stop[.]

(Emphasis added.)

Crediting Officer Thompson's testimony, as the trial court did, the record establishes that it was longer than "approximately 30 minutes to an hour" between the time Officer Thompson observed Defendant drinking a can of beer on the porch and when he pulled her car over later that evening. While he offered the 30 to 60 minute window on direct examination at the suppression hearing, he clarified on cross-examination that the timeframe was in fact approximately two hours, as reflected by the citation he issued to Defendant on the evening in question. On re-direct, moreover, Officer Thompson confirmed that it was at least an hour and a half between when he saw Defendant drinking and "buying more beer" at the gas station. The trial court's order denying the motion to suppress also finds that Officer Thompson "initiated the traffic stop at approximately 11:00 pm[,]" two hours after initially observing Defendant on the porch. This finding is supported by competent evidence and conflicts with the fifth finding of fact. The trial court's fifth finding of fact was for these reasons not supported by competent evidence, and is not binding on appeal. *See State v. Parker*, 137 N.C. App. 590, 598, 530 S.E.2d 297, 302 (2000).

We next consider whether, absent the evidentiary support of the fifth finding of fact, Officer Thompson had a reasonable, articulable suspicion to make the stop. Viewing the facts in the light most favorable to the State, the trial court concluded as a matter of law:

> Looking at the totality of the circumstances there was a reasonable, articulable suspicion that justified the traffic stop and, viewing all the facts and circumstances through a reasonably cautious officer, being guided by his experience and training, and prior knowledge of the Defendant.

The bulk of the evidence before the trial court at the suppression hearing belies this conclusion. Officer Thompson did not see Defendant stumble or otherwise appear impaired upon leaving the BP with a beer in a brown bag and entering her car. There was no evidence that Defendant drank from the beer she purchased.[1] Defendant did not violate any traffic laws prior to the stop. What is more, according to Officer Thompson's own testimony, Defendant's "[d]riving appeared normal" that evening. Defendant was not driving too fast, nor was she driving too slowly. She did not weave or swerve. She had no problem pulling over to the side of the road during the course of the traffic stop.

In contrast, the evidentiary basis for the stop was quite limited. Officer Thompson was clear on this point: "I stopped her because earlier that night I observed her drinking a beer. She went back in the store, bought more beer, and then decided to get under the wheel and drive."

The State also makes reference to Defendant's past criminal record for driving while license revoked and for an open container violation. Prior charges alone, however, do not provide the requisite reasonable suspicion and these particular priors are too attenuated from the facts of the current controversy to aid the State's argument. *See State v. Branch*, 162 N.C. App. 707, 713, 591 S.E.2d 923, 926 (2004), *rev'd on other grounds sub. nom. North Carolina v. Branch*, 546 U.S. 931, 163 L. Ed.2d 314 (2005) (prior knowledge that defendant's license had been revoked sufficient to justify license check but insufficient to justify dog sniff and subsequent search).

Considering the totality of the circumstances, there was no "pattern[] of operation of [a] certain kind[] of lawbreaker[,]" and "[f]rom these data" Officer Thompson's inferences and deductions went too far. *See United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L. Ed.2d 621, 629 (1981). Accordingly, we hold that the trial court erred in concluding that Officer Thompson had reasonable suspicion to stop Defendant's vehicle and thus erred in denying Defendant's motion to suppress.

Having determined that the motion to suppress was erroneously denied, we advance to the second step in our plain error review—whether this error had a probable impact on the jury's determination that Defendant was guilty. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Here, the answer is straightforward. If Defendant's motion to suppress

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1. In fact, at trial Officer Thompson confirmed that the beer was unopened at the time of the stop.

had been granted, there would have been no evidence showing criminal conduct on her part as Officer Thompson was the sole witness at trial, and all incriminating evidence was gathered by him as a result of the stop. Thus, the trial court's erroneous denial of Defendant's motion to suppress Officer Thompson's testimony under N.C. Gen. Stat. § 15A-977 had a probable impact on the jury's verdict. *See id.* Accordingly, the trial court's denial of Defendant's motion to suppress constituted plain error and reversal of the judgment entered upon the jury's verdict is required.

III. Conclusion

For the foregoing reasons, we reverse the trial court's order denying Defendant's motion to suppress and vacate the judgment entered upon a jury verdict based exclusively on evidence obtained through an unconstitutional stop.

ORDER REVERSED; JUDGMENT VACATED.

Judges INMAN and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
SHAWN PATRICK ELLIS, DEFENDANT

No. COA19-59

Filed 18 June 2019

Search and Seizure—knock and talk doctrine—curtilage of home—search around yard

Defendant was subjected to an unconstitutional warrantless search where a police officer attempted a "knock and talk" at the front door of his home but received no answer, then walked to the rear door of the home to try knocking, then walked to the front yard near the corner of the home opposite the driveway and smelled marijuana, and then peered between the slats of a padlocked crawl space area and observed a marijuana plant. The officer impermissibly invaded the home's curtilage after he received no answer at the front door, and the presence of a cobweb on the front door did not give him license to move around the yard at will.

STATE v. ELLIS

[266 N.C. App. 115 (2019)]

Appeal by defendant from judgment entered 14 June 2018 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 7 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kirk R. Chrzanowski, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant.

ARROWOOD, Judge.

Shawn Patrick Ellis ("defendant") appeals the denial of his motion to suppress, and from a judgment entered based upon his guilty pleas to manufacturing marijuana, attempted trafficking of marijuana, possession of drug paraphernalia, possession with intent to sell and deliver marijuana, and maintaining a dwelling house for keeping and selling a controlled substance. Those pleas were entered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970) (hereinafter, "*Alford* plea"). For the following reasons, we reverse.

I. Background

On 9 September 2014, Cabarrus County Sheriff's Detectives Helms ("Detective Helms") and Kevin Klinglesmith ("Detective Klinglesmith") responded to a home off NC Highway 49 in reference to a felony larceny report involving the theft of a Bobcat earth moving equipment. The officers located the equipment at the home, and were informed by a witness there that the person who had stolen the equipment was at a house "across the street[.]" The house belonged to defendant.

The officers parked across the street from defendant's house and walked along the wood line to the right of the driveway. Detective Klinglesmith testified that the driveway was on the right side of the home, and the front door of the residence was "further to the right half" and was the door closest to the road. Detective Helms went to the front door and knocked, but no one responded. He noticed there was a large spider web present in the door frame.

Detective Klinglesmith went around to the right rear of the house behind the residence. He testified that he went to the rear of the house because the detectives were dealing with a felony suspect, and he believed the backyard was an access point, due to vehicles along the right side to the rear of the residence. There were no visible gates or "No Trespassing" signs surrounding the residence.

Detective Helms failed to get a response at the front door after knocking for several minutes, however, he saw a curtain in the front window move. Detective Helms radioed Detective Klinglesmith to tell him the curtain moved, and Detective Klinglesmith began to knock at the rear door for several minutes. He was also unsuccessful at getting anyone to answer the door.

When Detective Klinglesmith did not hear anything from the back of the house, or see anyone inside the home, he walked to the front yard near the left front corner of the residence. He still did not see or hear anyone from that vantage point. However, he was able to smell the odor of marijuana. Detective Klinglesmith called Detective Helms over to the front of the house and asked him if he noticed anything odd. Detective Helms also smelled marijuana.

Detective Klinglesmith heard a loud fan coming from a crawl space area and noticed the odor of the marijuana from that area. He noticed a light illuminating from a padlocked crawl space area. He testified that he "put [his] eye up to it without touching it . . . [he] could see between the slats" and observed what he believed to be a marijuana plant in a bucket inside the crawlspace. The detectives contacted vice and narcotics officers. Detective D.J. Miller of the Cabarrus County Sheriff's Office applied for and received a warrant authorizing the search of defendant's residence based solely upon the information obtained from Detectives Klinglesmith and Helms. The search warrant was issued at 11:25 a.m. and was executed within the hour. Various drugs and drug paraphernalia were seized from the premises.

On 29 September 2014, defendant was charged with manufacturing marijuana, trafficking in marijuana, possessing drug paraphernalia, possessing marijuana with intent to sell or deliver, maintaining a dwelling used for keeping and selling a controlled substance, and trafficking in opiates.

Prior to trial, defendant filed a motion to suppress "all evidence of any kind" including seized drugs, statements of the defendant, or any other witnesses present at the time of the search. A hearing was held on 10 May 2017 before the Honorable Martin B. McGee in Cabarrus County Superior Court. On 3 April 2018, the court issued a written order denying the motion. The pertinent findings of fact are as follows:

> 4. Detective Helms knocked numerous times at the front door but was unable to make contact with anyone inside the residence. . . .

5. After no contact was made knocking at the front door, Detective Helms noticed the front window curtain move. When that information was communicated to Detective Klinglesmith by radio, Detective Klinglesmith walked back up to the front of the residence. While Detective Helms was still trying to make contact, Detective Klinglesmith walked to the front yard near the left front corner of the [sic] to observe the unfolding situation. At that point, Detective Klinglesmith detected an odor of marijuana.

6. Detective Helms also independently noticed an odor of marijuana. While Detective Klinglesmith was standing on the side of the residence, he also heard a loud fan coming from the crawlspace area and noticed that the air conditioning units were off. He noted that the odor of marijuana was coming from that area. He also noticed a light on in the crawlspace area where the [marijuana] odor was emanating. There were two wooden doors with cracks that allowed Detective Klinglesmith to see inside without manipulating the doors. He observed in plain view a white five gallon bucket with a green leafy plant that was suspected to be marijuana. Detective Klinglesmith alerted Detective Helms and they left the premises to obtain a search warrant.

Based upon these findings of fact, the court made eight conclusions of law, including that:

6. . . . What the detectives smelled and saw given its exposure was not detected as part of a search. The smells and observations were in plain smell or view from locations in which the detectives had a right to be given all of the circumstances in this case.

Defendant, after reserving his right to appeal, entered *Alford* pleas to all but one of the charges. Following entry of judgment, defendant filed a written notice of appeal.

II. Discussion

Defendant argues the trial court erred in denying his motion to suppress because the court failed to take into account the limitations that apply when law enforcement officials enter private property to acquire

information. We agree. Pursuant to the precedent established by the United States Supreme Court in *Florida v. Jardines*, 569 U.S. 1, 185 L. Ed. 2d 495 (2013), as applied by recent decisions of this Court, we hold that the search without a warrant violated defendant's rights under the Fourth Amendment to the Constitution of the United States. Therefore, the trial court erred in denying defendant's motion to suppress the evidence seized pursuant to the search warrant.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law are reviewed *de novo*[.]" *State v. Franklin*, 224 N.C. App. 337, 346, 736 S.E.2d 218, 223 (2012), *aff'd by an equally divided court*, 367 N.C. 183, 752 S.E.2d 143 (2013) (quotations and citation omitted).

"The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents." *State v. Sanders*, 327 N.C. 319, 331, 395 S.E.2d 412, 420 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991) (citation omitted).

> [W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

Jardines, 569 U.S. at 6, 185 L. Ed. 2d at 501 (internal citation and quotations omitted). North Carolina has extended this "first among equals" protection to the curtilage. *State v. Rhodes*, 151 N.C. App. 208, 214, 565 S.E.2d 266, 270, *writ denied*, *review denied*, 356 N.C. 173, 569 S.E.2d 273 (2002).

> The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself. [T]he curtilage is the area to which

> extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes. In North Carolina, curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.

Id. (internal quotations and citations omitted) (alteration in original).

In the present case the undisputed evidence establishes that all the facts, which formed the basis for the search warrant, were obtained while the officers were within the curtilage of defendant's home. The State relies upon the "knock and talk" exception in an attempt to salvage the actions of the detectives. It argues that the detective's actions in going around to the back door and to the left corner of the house were justified because those actions were an extension of a "knock and talk."

> "Knock and talk" is a procedure utilized by law enforcement officers to obtain a consent to search when they lack the probable cause necessary to obtain a search warrant. That officers approach a residence with the intent to obtain consent to conduct a warrantless search and seize contraband does not taint the consent or render the procedure *per se* violative of the Fourth Amendment.

State v. Smith, 346 N.C. 794, 800, 488 S.E.2d 210, 214 (1997). A knock and talk "implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8, 185 L. Ed. 2d at 502 (internal quotations and citations omitted).

In *Jardines*, the United States Supreme Court held that officers conducted a search within the meaning of the Fourth Amendment when they attempted a knock and talk at a residence, but also brought a forensic narcotics dog onto the defendant's property to explore the areas around the home. *Id.* at 11-12, 185 L. Ed. 2d at 504. Thus, the evidence the trained police dog discovered was inadmissible because "the officers learned what they learned only by physically intruding on Jardines' property to gather evidence[.]" *Id.* at 11, 185 L. Ed. 2d at 504.

In the instant case, while there was no police dog accompanying the officers, the same standards apply. The detectives were not permitted to roam the property searching for something or someone after attempting a failed "knock and talk." Without a warrant, they could only "approach

the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8, 185 L. Ed. 2d at 502.

Here, the detectives overstayed their "knock and talk" welcome on the property. Detective Helms knocked on the front door, but, when no one answered, he remained. Further, Detective Klinglesmith walked around to the rear door and then to the left front corner of the yard. By moving away from the front door, and entering the sides of defendant's yard and approaching the back door, Detective Klinglesmith was moving into the curtilage of defendant's home without a warrant.

North Carolina courts have consistently applied these principles. For example, in *State v. Huddy*, __ N.C. App __, 799 S.E.2d 650, (2017), an officer was investigating a possible break-in and declined to knock on the front door as it was "covered in cobwebs and did not appear to be used as the main entrance to the house." *Id.* at __, 799 S.E.2d at 653. The officer then "cleared" the sides of the house, opened a gate to a chain link fence in the backyard and approached a storm door not visible from the street, where he smelled marijuana. *Id.* This Court found that a search had occurred, as "law enforcement may not use a knock and talk as a pretext to search the home's curtilage[,]" and this doctrine "does not permit law enforcement to approach any exterior door to a home." *Id.* at __, 799 S.E.2d at 654 (internal quotations and citation omitted) (emphasis in original). An officer may only knock at the door that a "reasonably respectful citizen" unfamiliar with the home would believe is the door at which to knock. *Id.* He or she may not subjectively choose an alternate door, even if there are cobwebs on the front door.

This Court reached a similar conclusion in *State v. Stanley*, __ N.C. App. __, 817 S.E.2d 107 (2018). *Stanley* considered the legality of a knock and talk where officers walked into the backyard and knocked on the back door, rather than the front door, because they had seen an informant purchasing drugs at the back door. *Id.* at __, 817 S.E.2d at 109. "[T]he fact that the resident of a home may choose to allow certain individuals to use a back or side door does not mean that similar permission is deemed to have been given generally to members of the public." *Id.* at __, 817 S.E.2d at 113. In contrast, in *State v. Grice*, 367 N.C. 753, 767 S.E.2d 312 (2015), officers were lawfully permitted to use a door other than the front door for a knock and talk, in that case that front door was "inaccessible, covered with plastic, and obscured by furniture" and the side door "appeared to be used as the main entrance." *Id.* at 754, 767 S.E.2d at 314.

Here, defendant's front door was not obscured or covered with plastic. Instead, there was a cobweb. Per the trial court's findings of fact, "Detective Helms knocked numerous times at the front door but was unable to make contact" and observed a curtain beside the front door move. Neither of these facts constitutes an invitation to remain. If anything, these facts support the reasonable conclusion that the occupant saw the detectives outside and did not wish to speak with them, as is his right.

> When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.

Kentucky v. King, 563 U.S. 452, 469-70, 179 L. Ed. 2d 865, 881 (2011) (citation omitted). After noting the curtain moved, Detective Helms continued to attempt to make contact. The fact that no one inside the house chose to answer either door or yell out from within that they would presently open the doors indicates a clear choice to not speak to the detectives. As such, under the knock and talk exception, the detectives should have left the property at this time. Thus, all the facts obtained by the search of the curtilage after this point were improper.

The State also argues that Detective Klinglesmith was permitted to be in the yard due to a lack of "no trespassing" signs. In support of this contention, the State relies on *State v. Pasour*, 223 N.C. App. 175, 741 S.E.2d 323 (2012), in which the Court found that presence of a "no trespassing" sign may be evidence of a homeowner's expectation of privacy. *Id.* at 178-79, 741 S.E.2d at 326. However, the Court also found that the presence of a "no trespassing" sign is not dispositive. *Id.*

In *Pasour*, similar to the instant case, officers knocked on the front and side door of a residence, and when they received no response, they moved to the back of the residence where they discovered marijuana plants. *Id.* at 175-76, 741 S.E.2d at 324. This Court found that the homeowner had a reasonable expectation of privacy because there was no evidence that the plants could be seen from the front or the road, there was a "no trespassing" sign, there was nothing to suggest the common use of the rear door, and "there [was] no evidence in the record that suggests that the officers had reason to believe that knocking at [the] [d]efendant's back door would produce a response after knocking multiple times at his front and side doors had not." *Id.* at 179, 741 S.E.2d

at 326. While the evidence of a posted no trespassing sign may be evidence of a lack of consent, nothing in *Pasour* supports the State's attempted expansion of the argument that the lack of such a sign is tantamount to an invitation for someone to enter and linger in the curtilage of a residence.

While, in the present case, Detective Klinglesmith described seeing the crawl space and smelling the marijuana from his position in the front of the house, he also testified that he was in the yard at the left corner of the house, rather than on a porch when he made these observations. By moving away from the front door and entering the sides of defendant's yard, approaching the back door, Detective Klinglesmith moved onto the curtilage of defendant's home without a warrant. There is no evidence that the detectives saw or smelled marijuana on their approach to the residence, nor from the front door. It was only after Detective Klinglesmith invaded the curtilage and walked around the home that he smelled and saw it.

While there was some evidence that the rear door was being used by the occupants – the presence of the spider web at the front door and the vehicles parked in the backyard – that did not authorize the detective to approach the back door after failing to make contact at the front door. In addition, none of these facts supports the detective moving through the yard attempting to conduct surveillance. Similar to the detectives in *Pasour*, the detectives here had no evidence that by knocking on the back door someone would finally open the door.

In its conclusions of law, the trial court found that the odor and observation of the marijuana was in plain view from Detective Klinglesmith's location.

> In order for the plain view doctrine to apply, (1) the officer must have been in a place where he had a right to be when the evidence was discovered; (2) the evidence must have been discovered inadvertently; and (3) it must have been immediately apparent to the police that the items observed were evidence of a crime or contraband. The burden is on the State to establish all three prongs of the plain view doctrine.

State v. Lupek, 214 N.C. App. 146, 150, 712 S.E.2d 915, 918 (2011) (internal citation omitted). The plain view doctrine does not apply here because Detective Klinglesmith was not in a place he was entitled to be when he discovered the marijuana.

Furthermore, even if he had been entitled to be in that section of the yard, the crawl space was blocked off in a way that suggested a private space. Here the State relies upon the fact that the detective could see the contraband through a slit in the basement door. In *State v. Tarantino*, 322 N.C. 386, 368 S.E.2d 588 (1988), our Supreme Court held that nothing "suggests that an expectation of privacy is eliminated by quarter-inch cracks in the back wall of an otherwise sealed building." *Id.* at 391, 368 S.E.2d at 591-92. In *Tarantino*, the officer obtained a warrant based on peering through cracks in a commercial building and observing marijuana inside. *Id.* at 388, 368 S.E.2d at 590. The building's front door had been padlocked, the back doors nailed shut, and the windows were boarded. *Id.* at 387, 368 S.E.2d at 590. Our Supreme Court held:

> [t]he building's padlocked front door, nailed back doors, and boarded windows indicate that defendant had a subjective expectation of privacy in his building's interior. This expectation was not unreasonable even though there were small cracks between the boards in the building's back wall. The presence of tiny cracks near the floor on the interior wall of a second-floor porch is not the kind of exposure which serves to eliminate a reasonable expectation of privacy.

Id. at 390, 368 S.E.2d at 591.

Here, Detective Klinglesmith testified that the crawl space had padlocks and that he "put [his] eye up to it without touching it . . . [he] could see between the slats" to see the marijuana plants. In its findings of fact, the trial court found that Detective Klinglesmith looked through "cracks" to see the plants. While it is unclear how large these "slats" or "cracks" were, the fact that the detective had to put his eye up to the crawl space to see the plants, along with the padlocks on the access door, suggests an area where defendant would expect an amount of privacy. Therefore, defendant had a reasonable expectation of privacy in his locked crawlspace, which was violated when Detective Klinglesmith looked inside without a warrant.

Given all the undisputed facts of this case, we hold that Detective Klinglesmith's actions in moving to the rear door, moving around the yard, and looking into the crawl space constituted an improper warrantless search under the Fourth Amendment. Therefore, the evidence obtained by virtue of the illegal search should have been suppressed. The trial court erred in denying the defendant's motion to suppress.

III. Conclusion

For all the foregoing reasons, we reverse the order denying the motion to suppress and judgment entered pursuant to defendant's *Alford* pleas.

REVERSED.

Judges TYSON and INMAN concur.

STATE OF NORTH CAROLINA
v.
SHEKITA MONLEE PENDER, DEFENDANT

No. COA18-859

Filed 18 June 2019

Assault—with a deadly weapon inflicting serious injury—self-defense—from assaults not involving deadly force—jury instruction

In a prosecution for assault with a deadly weapon inflicting serious injury, it was not plain error for the trial court to instruct the jury on self-defense for assaults not involving deadly force while also instructing that a knife—which defendant struck an unarmed victim with—was a deadly weapon. Defendant was not entitled to a self-defense instruction for assaults involving deadly force because the evidence failed to show that she reasonably apprehended death or serious bodily injury when she stabbed the victim. Moreover, the trial court's jury instruction was more favorable to defendant and, therefore, did not prejudice her.

Appeal by Defendant from judgment entered 8 February 2018 by Judge Jeffery B. Foster in Wilson County Superior Court. Heard in the Court of Appeals 24 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jess D. Mekeel, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for the Defendant.

DILLON, Judge.

Defendant Shekita Monlee Pender appeals from a judgment entered upon a jury's verdict finding her guilty of assault with a deadly weapon inflicting serious injury. We conclude that the trial court properly instructed the jury and that Defendant received a fair trial, free from reversible error.

I. Background

Defendant was in a physical altercation with another woman. At some point during the altercation, Defendant cut the other woman a number of times with a knife, requiring the woman to receive over one hundred (100) stitches. Defendant was indicted and tried for felony assault with a deadly weapon inflicting serious injury based on this altercation.

During the trial, the jury was instructed on the crime of assault with a deadly weapon inflicting serious injury. The jury was given a generic self-defense, pattern jury instruction. However, the jury was not given the self-defense, pattern jury instruction for assaults where deadly force is used.

The jury found Defendant guilty, and Defendant was sentenced in the presumptive range. Defendant gave notice of appeal in open court.

II. Analysis

Defendant argues that the trial court committed plain error by instructing the jury on the crime for which she was tried, assault with a deadly weapon inflicting serious injury, and that "[a] knife is a deadly weapon[,]" while only providing an instruction for self-defense specific to assaults not involving deadly force.

As Defendant failed to object to the jury instructions at trial, we review for plain error. *State v. Bagley*, 321 N.C. 201, 211, 362 S.E.2d 244, 250 (1987). "Under the plain error rule, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

In North Carolina, a defendant may be criminally excused from assaulting another if she acts in self-defense, so long as the force used to repel the attack is not excessive:

> If one is without fault in provoking, or engaging in, or continuing a difficulty with another, [s]he is privileged by the

> law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect [her]self from bodily injury or offensive physical contact at the hands of the other, even though [s]he is not thereby put in actual or apparent danger of death or great bodily harm.

State v. Anderson, 230 N.C. 54, 56, 51 S.E.2d 895, 897 (1949). And while a defendant may generally employ non-deadly force to protect her from "bodily injury or offensive contact," she "may employ *deadly* force in self-defense *only* if it reasonably appears to be necessary to protect against . . . *great* bodily injury" or "death[.]" *State v. Clay*, 297 N.C. 555, 562-63, 256 S.E.2d 176, 182 (1979) (emphasis added).

Recognizing that a defendant may only use deadly force to protect herself from great bodily injury or death, the North Carolina Pattern Jury Instructions provide two different sets of jury instructions for self-defense: Pattern Jury Instruction 308.40 and 308.45. NCPI-Criminal 308.40 provides, in pertinent part, that the use of non-deadly force is justified

> [i]f the circumstances, at the time the defendant acted, would cause a person of ordinary firmness to reasonably believe that such action was necessary or apparently necessary to protect that person from *bodily injury* or *offensive physical contact*[.]

(Emphasis added). Whereas, NCPI-Criminal 308.45 provides, in pertinent part, that the use of deadly force is justified

> [i]f the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from *imminent death* or *great bodily harm*.

(Emphasis added).

When the evidence, in the light most favorable to the defendant, supports a finding she acted in self-defense, the trial court *must* give the appropriate self-defense instruction(s). *See State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979) (holding that the instruction must be given where supported by the evidence); *Clay*, 297 N.C. at 565-66, 256 S.E.2d at 183 (holding that the *appropriate* instruction to be given depends on whether or not the defendant used deadly force). Of course, a trial judge is never required to give a particular self-defense

instruction if that instruction is not supported by the evidence. *See State v. McLawhorn*, 270 N.C. 622, 630, 155 S.E.2d 198, 204 (1967).

Therefore, a defendant is entitled to an instruction consistent with NCPI-Criminal 308.40 when it could be determined from the evidence that the defendant faced the threat of bodily injury or offensive contact *and* that defendant did not use deadly force or other force deemed excessive as a matter of law to repel the attack.[1] A defendant is *never* entitled to this instruction if the only conclusion from the evidence is that she used deadly force to repel an attack, as such use of force is excessive as a matter of law.[2]

And a defendant is entitled to an instruction consistent with NCPI-Criminal 308.45 where it could be determined from the evidence that the defendant faced a reasonable threat of serious bodily harm or death and that the defendant used deadly, or lesser, force to repel the attack.[3]

Thus, the relative inquiry is not whether the defendant had an intent to kill, but the nature of the underlying attack and how much force the defendant used in repelling the attack. *Clay*, 297 N.C. at 561, 256 S.E.2d at 181.[4]

The evidence in the present case, taken in the light most favorable to the State, is certainly sufficient to sustain Defendant's conviction: Defendant and the victim were fighting. At some point, Defendant left the fight to retrieve a knife; Defendant returned, swinging the knife; Defendant struck the victim with wounds requiring over one hundred

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1. *Clay*, 297 N.C. at 566, 256 S.E.2d at 183 (stating that if the weapon used by the defendant is not a deadly weapon per se, "the trial judge should instruct the jury that if they find that defendant assaulted the victim *but do not find that he used a deadly weapon*, that assault would be excused as being in self-defense if [the defendant reasonably feared] bodily injury or offensive physical contact.").

2. *Clay*, 297 N.C. at 566, 256 S.E.2d at 183 (stating that "[i]f the weapon used is a deadly weapon per se, no reference should be made at any point in the charge to 'bodily injury or offensive physical contact.' ").

3. *Clay*, 297 N.C. at 565-66, 256 S.E.2d at 183 (stating that "[i]n cases involving assault with a deadly weapon, trial judges should, in the charge, instruct that the assault would be excused [if the defendant reasonably believed the assault] was necessary to protect [herself] from death or great bodily harm.").

4. Our Supreme Court has found jury instructions erroneous when the trial court combined and conflated the concepts of "death or great bodily harm" and "bodily injury or offensive physical contact." *Clay*, 297 N.C. at 561, 256 S.E.2d at 181; *accord State v. Fletcher*, 268 N.C. 140, 142, 150 S.E.2d 54, 56 (1966) (holding a jury instruction regarding self-defense prejudicial because it improperly placed the burden on the defendant to show that he acted in self-defense of death or great bodily harm).

(100) stitches; another person was cut by the knife while trying to break up the fight; and at all times the victim was unarmed.

The evidence, taken in the light most favorable to Defendant, however, showed that she acted in self-defense. Specifically, in this light, the evidence showed as follows: During a heated argument, the victim struck Defendant first. Then after a calming down period, the victim again attacked Defendant, this time by cutting Defendant's arm with a "little pocketknife." Defendant grabbed the knife from the victim and, while the victim was unarmed, "cut [the victim]." The victim continued to fight Defendant until others intervened to stop the altercation.

The jury was given a self-defense instruction consistent with NCPI-Criminal 308.40, that Defendant's assault should be excused if the jury determined that Defendant faced the threat of "bodily injury or offensive physical contact" and did not use excessive force to repel the threat.

On appeal, Defendant argues that since the jury could have determined that the knife was a deadly weapon, she was entitled to an instruction consistent with NCPI-Criminal 308.45, which excuses an assault by the use of a deadly weapon when faced with a threat of death or *serious* bodily harm. However, viewing the evidence in the light most favorable to Defendant, we conclude that the evidence was not sufficient to support a finding that Defendant reasonably apprehended death or great bodily harm when she struck the victim with the knife. Therefore, the trial court did not err in failing to give the instruction.

Assuming *arguendo* that there was sufficient evidence from which the jury could conclude that Defendant reasonably feared *serious* bodily harm, as opposed to just fearing bodily injury or offensive contact, at the time she stabbed and cut the victim with the knife, we conclude that any error by the trial court in failing to give an instruction consistent with NCPI-Criminal 308.45 did not rise to the level of plain error. Indeed, our Supreme Court has held that such error is not prejudicial: an instruction consistent with NCPI-Criminal 308.40, even where a jury could determine that the defendant used a deadly weapon, is "more favorable than that which defendant was entitled." *Clay*, 297 N.C. at 565, 256 S.E.2d at 183. Based on the instruction actually given, assuming the other requirements of self-defense were met, the jury was free to excuse Defendant's assault even if they found the knife to be a deadly weapon by making a mere finding that Defendant feared bodily injury, a much lower threshold than serious bodily harm or death. *Id.*; *see also State v. Loftin*, 322 N.C. 375, 381, 368 S.E.2d 613, 617 (1988) (concluding that a trial judge's "jury instruction concerning self-defense" did not amount to plain error

whereby it provided the jury with "a vehicle by which to acquit defendant that it would not otherwise have had.").[5]

III. Conclusion

It was not plain error for the trial court to instruct the jury on the crime of assault with a deadly weapon inflicting serious injury and on self-defense of assaults not involving deadly force.

NO ERROR.

Judges INMAN and HAMPSON concur.

DERRICK SYKES, PLAINTIFF
v.
EMMANUEL VIXAMAR AND PROGRESSIVE UNIVERSAL INSURANCE COMPANY, DEFENDANT-INTERVENOR, DEFENDANTS

No. COA18-525

Filed 18 June 2019

1. Hospitals and Other Medical Facilities—billing—interaction between fair medical billing statute and medical lien statute—personal injury case—hospital's medical lien—valid

In a personal injury case, where the hospital that treated plaintiff's injuries did not bill plaintiff's health insurer for his medical care but instead relied solely on a medical lien on plaintiff's potential judgment from the lawsuit, the interaction between the medical lien statute (N.C.G.S. § 44-49(a)) and the fair medical billing statute (N.C.G.S. § 131E-91(c), which prohibited hospitals from billing patients for charges that health insurance would have covered if the

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5. We acknowledge the State's argument concerning "invited error." At the charging conference, both Defendant and the State encouraged the trial court to use NCPI-Criminal 308.40. As such, the State argues that any error in not also giving NCPI-Criminal 308.45 was invited error, pursuant to Section 15A-1443(c) of our General Statutes. N.C. Gen. Stat. § 15A-1443(c) (2018). However, our Supreme Court has held that it is the duty of the trial court to give a specific self-defense instruction "where competent evidence of self-defense is presented at trial," regardless of "any specific request by the defendant." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986). Thus, if the evidence supported a NCPI-Criminal 308.45 instruction, the trial court was required to give it, notwithstanding that Defendant did not ask for it.

hospital had timely submitted a claim) did not eliminate the hospital's right to collect payment through the lien. Therefore, the trial court did not err by admitting evidence of the hospital's lien and underlying medical charges where defendant-intervenor, in moving to exclude that evidence as irrelevant, erroneously argued that the two statutes' combined effect was to invalidate the lien.

2. Evidence—personal injury case—evidence challenging hospital's medical lien—admissibility

In a personal injury case where, to obtain payment on plaintiff's medical bill, the hospital that treated plaintiff's injuries relied solely on a statutory medical lien on his potential tort judgment, the trial court properly excluded evidence offered to show that N.C.G.S. § 131E-91(c) barred the hospital from collecting payment through the lien when, in fact, Section 131E-91(c) did not have that effect. Additionally, the evidence rule regarding satisfaction of medical charges for less than the full amount originally charged (N.C.G.S § 8-58.1(b)) did not apply to the evidence at issue.

Appeal by defendant from judgment entered 5 February 2018 by Judge Walter H. Godwin, Jr. in Nash County Superior Court. Heard in the Court of Appeals 30 January 2019.

Ricci Law Firm, P.A., by Meredith S. Hinton, for plaintiff-appellee.

Teague, Rotenstreich, Stanaland, Fox & Holt, PLLC, by Camilla F. DeBoard and Kara V. Bordman, for defendant-appellant.

Christopher R. Nichols; Kluttz, Reamer, Hayes, Adkins & Carter, by Michael S. Adkins; and The Law Offices of James Scott Farrin, by J. Gabe Talton, for amicus curiae North Carolina Advocates for Justice.

DIETZ, Judge.

Derrick Sykes was injured in a car accident and sought care at Nash Hospital. After learning that another driver likely was liable for Sykes's injuries, the hospital made a choice that is the heart of this appeal: it chose not to bill Sykes's health insurer for his medical care and instead to rely on a statutory medical lien on any payments Sykes received from the other driver.

That choice matters because there is a statute prohibiting hospitals from billing patients for charges that would have been covered by health insurance if the hospital had timely submitted a claim. *See* N.C. Gen. Stat. § 131E-91(c). The issue in this case is whether Section 131E-91(c) prevents a hospital from choosing to rely solely on a medical lien on a future liability judgment, rather than also billing the patient's health insurer.

As explained below, we hold that hospitals may make this choice without abandoning their medical liens. First, the text of the applicable statutes permits it. Second, a contrary interpretation would frustrate the purpose of Section 131E-91(c) by forcing patients to pay unnecessary deductibles and other charges upfront—even though the hospital would have been content to wait and recover those costs from a court judgment or settlement later.

Accordingly, the trial court did not err by permitting Sykes to introduce evidence of the hospital's lien and underlying medical charges, and by rejecting counter-evidence seeking to show that Section 131E-91(c) barred the hospital from billing Sykes directly for those charges.

Facts and Procedural History

In September 2015, Plaintiff Derrick Sykes and Defendant Emmanuel Vixamar were involved in a motor vehicle accident when Vixamar failed to stop at a red light and collided with the rear of Sykes's vehicle. Following the accident, Sykes sought medical treatment at Nash Hospital. The charges for Sykes's treatment at the hospital totaled $6,463.

Two months later, the hospital sent Sykes a letter and accompanying notice of medical lien informing Sykes that the hospital asserted a lien on any liability recovery, medical payments, or uninsured/underinsured motorist coverage. Sykes had health insurance through Blue Cross Blue Shield but the hospital did not submit the charges to Sykes's health insurer and did not seek to collect the charges directly from Sykes.

On 20 May 2016, Sykes filed this negligence action against Vixamar. Progressive Universal Insurance Company, who insured the owner of the vehicle that Vixamar was driving, later intervened as a defendant.

During discovery, the parties deposed Demetrius Hagins, a billing clerk at Nash Hospital. Progressive asked Hagins a series of questions concerning the hospital's decision to rely on the medical lien to recover for its medical services, rather than billing Sykes's health insurer:

> Q. With that lien, it means you will obtain funds based on the outcome of any lawsuit that he has or settlement, correct?

A. Correct.

. . .

Q. Okay. In the event that his recovery is less than the amount you have in this lien, which is $6,463, what happens to the remainder of the balance?

A. If it's less, we accept a pro rata share at settlement, and we adjust it off.

Q. Adjust it off in full?

A. No, we adjust the balance after the payment from the pro rata share.

. . .

Q. The outstanding balance, or the remainder of the bill, okay, what happens to the remainder of the bill for Mr. Sykes?

A. It is adjusted off. . . . We don't bill the patient.

Q. Okay. So the amount will be reduced to zero?

A. Yes.

Q. Okay. And if Mr. – if Mr. Sykes does not recover in this lawsuit, what happens – so a judgment or settlement of zero, what amount would be necessary to satisfy this September 15, 2015, bill?

. . .

Q. If he receives nothing from this –

. . .

A. We receive nothing.

. . .

Q. Okay. And so the amount is written off?

A. Yes.

. . .

Q. Okay. Why would it have to be adjusted off?

A. Timely filing.

Q. Because you can't bill the insured, correct?

A. Correct.

Before trial, the court heard the parties' evidentiary motions. Sykes moved to exclude "any and all testimony and hypotheticals from the Nash County billing clerk regarding potential negotiations of bills as speculative." Progressive moved to exclude any evidence about medical costs because, as a matter of law, the amount Sykes owes the hospital is "zero." Progressive asserted that the hospital never submitted the claim to Sykes's health insurer, which in turn meant that Sykes "cannot be billed directly" because of the patient protection provision in N.C. Gen. Stat. § 131E-91(c). Therefore, Progressive argued, "there is no valid lien."

Progressive also argued that "in the alternative let us provide testimony by Nash Hospital's representative." Progressive told the trial court that it would ask that representative whether it would be unlawful for the hospital to bill Sykes under N.C. Gen. Stat. § 131E-91 and "that would be [the] only question." Sykes's counsel responded, "If she asks that one question, we've got to ask him 50 other ones to get us back to the heart of the whole issue."

After reviewing a copy of Hagins's deposition, the hospital billing records, and the notice of lien, the trial court ruled that the Nash Hospital lien of $6,463 was admissible because "the notice of the medical lien [was] filed in a timely manner" and "therefore, the medical lien of $6,640 - $6,643 is what is due and owed." The trial court then ruled that "[a]ny testimony by the Nash Hospitals billing clerk is not going to be allowed," noting that "[i]t's a double-edged sword that's for sure."

At trial, Sykes introduced the statement of charges and the lien from Nash Hospital over Progressive's objection. Progressive sought to introduce portions of Hagins's deposition testimony to rebut the reasonableness of the lien amount, but the trial court reaffirmed its earlier ruling to exclude that evidence. During the jury charge, the trial court instructed the jury using the pattern jury instruction applicable where no evidence is offered to rebut the presumption that medical expenses are reasonable. Progressive again noted its objection to that instruction based on "not being allowed to put on rebuttal evidence."

The jury returned a verdict in favor of Sykes for $7,778, the total amount of the medical expenses presented at trial. The trial court entered judgment on the jury's verdict and Progressive timely appealed.

Analysis

I. Admissibility of Hospital Bill

[1] Progressive first argues that the trial court erred by admitting evidence of the medical bills Sykes incurred at Nash Hospital for treatment resulting from the accident. Progressive contends that the hospital was barred by law from billing Sykes for that medical treatment, which in turn meant Sykes could not recover those costs in the lawsuit. Thus, Progressive argues, evidence concerning the hospital's medical lien and corresponding bills was irrelevant and inadmissible as a matter of law.

Progressive's argument relies on the interactions between two statutes governing the payment and recovery of medical expenses. We briefly summarize these statutes for ease of understanding.

First, our State's medical lien statute creates a lien on any personal injury recovery "in favor of any person. . . to whom the person so recovering . . . may be indebted" for medical care "rendered in connection with the injury in compensation for which the damages have been recovered." N.C. Gen. Stat. § 44-49(a). Medical providers routinely use this statutory lien in personal injury cases to recover the amount owed for medical care from the judgment against the tortfeasor responsible for the injury.

Second, our State's fair medical billing statute provides that a hospital "shall not bill insured patients for charges that would have been covered by their insurance had the hospital or ambulatory surgical facility submitted the claim or other information required to process the claim within the allotted time requirements of the insurer." N.C. Gen. Stat. § 131E-91(c). This provision protects patients from being billed for charges that should have been covered by their health insurance.

Progressive contends that these two statutes, when combined, eliminate a hospital's medical lien any time the hospital fails to timely submit a claim to the patient's health insurer. This is so, Progressive asserts, because failing to timely submit the claim means the hospital cannot bill the patient. And, if the hospital cannot bill the patient, the patient cannot be "indebted" to the hospital—a requirement to assert a medical lien.

We reject this argument. At the time the hospital provided medical care to Sykes, it expected to be paid for that care—whether by Sykes himself, by his health insurer, or by the person who caused Sykes's injuries. All of these parties are responsible for paying for that care through some principle of contract or tort law. *See Shelton v. Duke Univ. Health Sys., Inc.*, 179 N.C. App. 120, 123–26, 633 S.E.2d 113, 115–17 (2006)

(holding that the patient is required to pay medical expenses under a hospital's contract for medical care); *Estate of Bell v. Blue Cross and Blue Shield of North Carolina*, 109 N.C. App. 661, 666, 428 S.E.2d 270, 272 (1993) (holding that a health insurer's payment obligations are controlled by contract); *Nash Hospitals, Inc. v. State Farm Mut. Auto. Ins. Co.*, __ N.C. App. __, __, 803 S.E.2d 256, 260 (2017) (holding that a medical provider, through a medical lien, is entitled to its pro rata share of a patient's settlement with a tortfeasor).

To be sure, when the hospital submitted a notice of lien to Sykes, and chose not to submit the claim to Sykes's health insurer, the hospital narrowed the sources from which it could be paid—in effect abandoning its ability to seek payment from Sykes and his health insurer. But we reject Progressive's argument that, when the hospital made this choice, the fair medical billing statute wiped away the debt. The statute protects patients from being billed for care that would have been covered by the patient's health insurer. N.C. Gen. Stat. § 131E-91(c). It is not intended to force hospitals to bill health insurers when other, alternative sources of payment also are available to satisfy the debt. Here, because Sykes received services from the hospital for which the hospital expected to be paid, and because there are sources through which the hospital lawfully can be paid for those services (without billing Sykes directly), Sykes remains indebted for the hospital's services under the plain language of the medical lien statute. N.C. Gen. Stat. § 44-49(a).

Moreover, were we to interpret these statutes as Progressive requests, it would have the perverse effect of requiring hospitals to bill patients and their health insurers immediately, although there is another potential source of payment through the medical lien. This, in turn, would mean the fair medical billing statute—a statute designed to protect patients from unnecessary hospital bills—would instead force patients to pay deductibles and other charges upfront even though the hospital would have been content to wait and recover those costs solely from a liability judgment or settlement in the future. That is not what the text of the fair billing statute requires, and certainly not what the legislature intended.

Progressive also asserts that although "this is a case of first impression in North Carolina, other jurisdictions have specifically addressed the need for an underlying, continuing debt to maintain a valid lien." But all of the cases on which Progressive relies address a separate issue—which we discuss in more detail below—concerning a hospital's attempt to collect *more* through a medical lien than what the hospital otherwise would have received for providing that care. *See, e.g.*, *Morgan v. Saint*

Luke's Hospital of Kansas City, 403 S.W.3d 115, 119 (Mo. Ct. App. 2013); *Midwest Neurosurgery, P.C. v. State Farm Ins. Co.*, 686 N.W.2d 572, 577, 579 (Neb. 2004).

Progressive pays particular attention to *Dorr v. Sacred Heart Hospital*, 597 N.W.2d 462, 469–71 (Wis. Ct. App. 1999), which it claims "addressed identical facts to this Appeal." But *Dorr*, like the other cases Progressive cites, is readily distinguishable. As the Wisconsin Court of Appeals later explained in clarifying the *Dorr* holding, the contract between the hospital and health maintenance organization in that case included "a contracted 'per diem rate' flat fee arrangement that the hospital used to charge the HMO for treatment of HMO subscribers." *Laska v. Gen. Cas. Co. of Wisconsin*, 830 N.W.2d 252, 264 (Wis. Ct. App. 2013). "The hospital filed the lien against the patient's tort claim in an apparent attempt to recover the difference between the per diem rate the HMO agreed to reimburse and the price based on an itemized cost basis." *Id.* In other words, as with the other cases cited above, *Dorr* involved a hospital seeking to recover *more* than it had agreed by contract to charge for those medical services. In North Carolina, as in these other jurisdictions, defendants may introduce evidence showing that a hospital seeks more through its lien than it would have otherwise accepted from a patient or health insurer.

But that is not what Progressive sought to do in this case. Progressive does not contend that the lien amount is greater than what Sykes would have paid had Vixamar not been responsible for the injuries. Instead, Progressive asserts that, *by operation of law*, when a hospital provides notice of a statutory medical lien to a patient but does not timely submit the underlying charges to the patient's health insurer, the hospital abandons the medical lien. We reject this argument and hold that a medical lien remains valid even if the hospital fails to timely submit those charges to the patient's health insurer.

Of course, by choosing not to bill a patient's health insurer in these circumstances, the hospital takes the risk that, if the third party is not held liable or is judgment proof, the hospital will never be paid. But that is the hospital's choice to make. Our holding is merely that, when a hospital makes that choice, the interaction between the medical lien statute and fair billing statute does not eliminate the hospital's right to collect payment through a medical lien.

Finally, Progressive identifies several harmful policy consequences of the hospital's billing practices in this case. For example, Progressive argues that federal regulations stemming from the Affordable Care Act

require hospitals to bill uninsured patients "an average of the amounts billed to patients with health insurance." The implication (although Progressive does not state it expressly) is that hospitals will choose whether to bill a health insurer or to seek recovery solely through a medical lien in ways that inflate their average charges to health insurers, in turn inflating the amount they can bill uninsured patients. Whatever the merit of this claim, it is directed at the wrong branch of government. "This Court is an error-correcting body, not a policy-making or law-making one." *Davis v. Craven County ABC Bd.*, __ N.C. App. __, __, 814 S.E.2d 602, 605 (2018). Enacting policy rules to stem rising healthcare costs falls far outside the appropriate role of the courts.

II. Exclusion of Progressive's Billing Evidence

[2] Progressive next argues that the trial court improperly excluded its evidence challenging the reasonableness of the hospital's billing practices. We agree with Progressive's general statement of the law in this area. Indeed, to ensure that our holding above causes no confusion, we restate the long-standing evidentiary rule in these cases: Evidence that the hospital would accept less than the amount claimed in a medical lien to satisfy the underlying bill is admissible to challenge the reasonableness of the bill. *See* N.C. Gen. Stat. § 8-58.1(b) (the presumption of reasonableness of medical charges is rebutted by "sworn testimony that the charge for that provider's service . . . can be satisfied by a payment of an amount less than the amount charged"); *see also* N.C. Gen. Stat. § 8C-1, Rule 414. Defendants in these cases may seek discovery on this issue and courts should freely admit this evidence at trial.

The flaw in Progressive's argument is that it never sought to admit this sort of evidence. The evidence Progressive sought to introduce concerned the hospital's failure to timely bill Sykes's health insurer and the resulting impact of the fair medical billing statute. Progressive intended to use that evidence to suggest that the hospital's actual bill was "zero" because the law prohibited the hospital from ever charging Sykes for those services. The trial court properly excluded that evidence because, as explained above, the interaction between the medical lien statute and fair medical billing statute does not render the bill uncollectible through a lien on Sykes's tort judgment.[1]

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1. Because the trial court properly excluded this evidence, the court also properly used the pattern jury instruction which applies when no rebuttal evidence is presented, instead of the pattern instruction requested by Progressive, which applies when evidence is presented to rebut the reasonableness of the medical charges. *See* N.C.P.I. Civil 810.04C, 810.04D.

Conclusion

The trial court properly permitted Sykes to introduce evidence of the hospital's lien and underlying medical charges, and properly excluded counter-evidence seeking to show that the hospital was barred by statute from collecting those charges. We therefore find no error in the trial court's judgment.

NO ERROR.

Judges INMAN and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JUNE 2019)

CHARDE v. TOWN OF DAVIDSON No. 18-938	Mecklenburg (18CVS943)	Affirmed
FENNELL v. E. CAROLINA HEALTH No. 18-1096	Hertford (16CVS155)	AFFIRMED IN PART; NO ERROR IN PART.
IN RE A.L.L. No. 18-902	Beaufort (18JT17)	Affirmed
IN RE D.F.J. No. 18-1127	Buncombe (16JA108)	Affirmed
IN RE J.P. No. 18-1124	Wake (18SPC1725)	Affirmed
IN RE K.C.W. No. 18-927	New Hanover (16JT70)	Affirmed
IN RE K.M.B. No. 18-1215	Surry (17JT11-13)	Affirmed
IN RE K.S.A. No. 18-1305	Surry (10JT73)	Reversed
IN RE M.Y.-F.H. No. 18-1180	Iredell (15JT105) (15JT106) (15JT107)	Affirmed
STATE v. BARNETT No. 18-1183	Cherokee (17CRS426)	NO ERROR IN PART, NEW TRIAL IN PART, AND DISMISSED IN PART.
STATE v. GEORGE No. 19-117	Guilford (16CRS26239) (16CRS65787) (16CRS700971)	No Error
STATE v. GILCHRIST No. 18-479	Moore (14CRS52457-58)	No prejudicial error in part; No error in part.
STATE v. HAQQ No. 18-339	Catawba (14CRS54163)	No Error

STATE v. PADILLA-AMAYA No. 18-856	Wake (13CRS207134-35) (13CRS207221-22)	No Error in Part; Vacated and Remanded in Part
STATE v. RICHARDSON No. 18-855	Wake (17CRS89-90)	No Error
STATE v. SPARKS No. 18-1102	Harnett (15CRS51383)	Affirmed
STATE v. TYLER No. 18-1184	Columbus (15CRS51173) (15CRS51174)	No Error
STATE v. VAZQUEZ No. 18-1296	New Hanover (16CRS60151-53) (17CRS2657)	NO ERROR IN PART; REMANDED FOR CORRECTION OF CLERICAL ERROR.
STATE v. WARE No. 18-1185	Clay (15CRS61)	No Error
STATE v. YORK No. 18-554	Randolph (16CRS4)	No Error
WINSTON AFFORDABLE HOUS., L.L.C. v. ROBERTS No. 18-553	Forsyth (17CVD1108)	Affirmed

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